INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
Injunction Proceedings and Trial	3
Appeal to the Supreme Court of Hawaii	5
Remand to the Circuit Court	6
Mandamus Proceedings	9
Manner in Which Federal Question Was Raised	11
Argument	12
The Three to Two Decision of the Supreme Court of Hawaii Directly Contravenes Applicable Decisions of This Court Establishing a Litigant's Right To Present Evidence on the Issues of His Case as a Fundamental Requisite of Procedural Due Process of Law	12
Conclusion	21
Appendix	1a

TABLE OF CITATIONS

CASES:

Akamine & Sons, Ltd. & Hawaii National Bank v. *American Security Bank*, 50 Hawaii 304, 440 P.2d 262 (1968)	2
Armstrong v. *Manzo*, 380 U.S. 545 (1965)	17
Brinkerhoff-Faris Trust & Sav. Co. v. *Hill*, 281 U.S. 673 (1929)	17, 18
Georgia R. & Electric Co. v. *Decatur*, 295 U.S. 165 (1935)	18, 19
Grannis v. *Ordean*, 234 U.S. 385 (1914)	17

Page

Helis v. *Ward*, 308 U.S. 365 (1939) 20, 21
Mullane v. *Central Hanover B. & T. Co.*, 339 U.S. 306 (1950) 17
Myles Salt Co. v. *Bd. of Commissioners*, 239 U.S. 478 (1916) 15
Saunders v. *Shaw*, 244 U.S. 317 (1917) 11, 14, 16, 17
Schroeder v. *New York*, 371 U.S. 208 (1962) 17
Western A. R. Co. v. *Henderson*, 279 U.S. 639 (1929) .. 20

STATUTES AND CONSTITUTIONS:

Amendment XIV to the Constitution of the United States 10, 11, 14, 15
Article I, Section 4 of the Constitution of the State of Hawaii 11
Section 196-1, Revised Laws of Hawaii, 1955 5

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

TOM OKINO, CIRCUIT JUDGE, FIRST CIRCUIT COURT OF HAWAII and AMERICAN SECURITY BANK,
Petitioners,

v.

HAWAII NATIONAL BANK, HONOLULU, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

Petitioners, Circuit Judge Tom Okino and American Security Bank, pray that a writ of certiorari issue to review the judgment rendered herein by the Supreme Court of Hawaii.

OPINIONS BELOW

The mandamus opinion of the Supreme Court of Hawaii, which is not yet reported, appears as Appendix A to this Petition. The opinion of the Circuit Court of

the First Circuit of Hawaii, written by Circuit Judge Okino, one of the Petitioners herein, and from which the writ of mandamus to the Supreme Court of Hawaii was filed, is unreported and appears as Appendix B hereto. The earlier opinion of the Supreme Court of Hawaii in this case, reported at 50 Hawaii 304, 440 P.2d 262 (1968), appears as Appendix C hereto. The opinion of the Circuit Court of the First Circuit of Hawaii in the original trial of this case, which is unreported, appears as Appendix D hereto.

JURISDICTION

The opinion of the Supreme Court of Hawaii for which review is sought was originally filed on November 12, 1969, with two of the five justices dissenting. A timely Petition for Rehearing *en banc* was denied, and final judgment entered on December 1, 1969. An application to this Court for an extension of time in which to file a petition for certiorari was granted by Mr. Justice Douglas on February 21, 1970, extending the time to and including April 16, 1970.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Does the decision of the Supreme Court of Hawaii violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in purporting to construct a new rule of law for the first time on appeal and undertaking to apply that rule in such a manner as to deny a party to the case an opportunity to present its evidence on what had become, under the new rule, the controlling factual issue?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which is set forth at Appendix E.

The state statutory provision involved is § 196-1, Revised Laws of Hawaii (R.L.H.), 1955, which is also set forth at Appendix E.

STATEMENT OF THE CASE

Petitioners seek review of this case because of the fundamental issue of procedural due process of law involved. At stake is one of the essential principles of an adversary system of justice: the right of a litigant to submit evidence on the issues of his case—his right, in other words, to have "his day in court."

In order to show how that right, which has been declared by this Court to be part of procedural due process of law under the Fourteenth Amendment, was violated by the majority decision of the Supreme Court of Hawaii, it is necessary to trace the history of this case. Although the factual presentation at times touches on matters of commercial law that may not appear to be directly relevant to the constitutional issue for which review by this Court is sought, a familiarity with the whole setting of the case is necessary for a proper understanding of the manner in which due process was denied.

1. Injunction Proceedings and Trial

This case began as an action for an injunction brought by Akamine & Sons, Ltd. (hereinafter "Akamine") to enjoin Petitioner, American Security Bank,[1]

[1] The reference herein to "Petitioner" in the singular form means American Security Bank.

from selling certain real property under a power of sale contained in a mortgage instrument executed by Akamine in favor of Petitioner. Respondent, Hawaii National Bank, which held later recorded mortgages on the same property from Akamine, intervened. The trial court denied the injunction, the properties were sold, and the only issue remaining for determination was the distribution of the proceeds of sale.

The mortgage instrument held by Petitioner contained a clause which provided that the mortgage would not be satisfied until the mortgagor

> ". . . shall discharge any and all obligations that now or hereafter may be or become owing directly or contingently by the Mortgagor to the Mortgagee on any and every account whether or not the same are mature, . . . and which obligations it is agreed by these presents are and shall be secured as additional charges against all the property hereby mortgaged . . . ."

The principal question before the trial court was whether four loans made by Petitioner, some before and some after execution of the mortgage instrument, were secured by the language of the above-quoted clause. These loans, totaling $585,000, were made as follows: (1) Loan of $190,000 to Val Super Market, Ltd., a corporation for all intents and purposes solely owned by the Akamine family, secured by a mortgage on chattels not here relevant and guaranteed by Akamine; (2) Loan of $250,000 to Akamine secured by the mortgage on real property described above; (3) Loan of $105,000 to Akamine secured by an additional charge mortgage on the same real property; and (4) Loan of $40,000 to Akamine and Val Super Market, Ltd., secured by a mortgage on different real property, not here relevant.

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The trial court, after reviewing both the common law of mortgages and the applicable Hawaii statute,[2] held that all four loans were secured by Petitioner's mortgage instrument. Thus, it awarded the entire proceeds of the sale of the property—a total of $449,000—to Petitioner. Respondent appealed this decision to the Supreme Court of Hawaii.

2. Appeal to the Supreme Court of Hawaii

The Supreme Court of Hawaii took the occasion of Respondent's appeal to state, for the first time, a major new rule of law on the validity and effectiveness of clauses in mortgage instruments, such as the one in Petitioner's instrument quoted above, securing past and future advances. It declared:

> "The statute [§ 196-1, R.L.H. (1955), see n. 2] may be read as authorizing the broadest form of mortgage for future advances, but we decline so to construe it." (Appendix C p. 38a).

The Court held instead:

> "We are prevented from holding a mortgage to secure future advances contrary to public policy by its statutory authorization and the undeniable benefits which it may engender. . . .
>
> • • • • • • • • • •
>
> Under the ejusdem generis rule [however], the statute does not require us to enforce a dragnet,

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[2] Section 196-1, R.L.H. (1955) provides in pertinent part that a mortgage

> "may secure . . a debt incurred for advances which may be made by the mortgagee subsequent to the execution of the mortgage even though the mortgagee is under no contractual duty to make such advances."

or anaconda, clause in a mortgage as to debts or obligations not of the same kind as the specific principal debt or obligation for which the mortgage is given. Unless the prior or subsequent advance relates to the same transaction or series of transactions, the mortgage must specifically refer to it for the advance to be secured." Appendix C p. 39a.)

Having decided for the first time[3] that, as a matter of law, such clauses apply only to prior or subsequent advances arising out of the same or a series of transactions, the Supreme Court of Hawaii concluded its opinion as follows:

"American Security [Petitioner] is entitled to receive proceeds from the foreclosure sale sufficient to cover the unpaid balances of the original loan of $250,000 and the subsequent loan of $105,000 with interest, costs, attorney's fees and other expenses properly chargeable to it. Hawaii National [Respondent] is entitled to the proceeds remaining to the extent that they may be required to cover its loan secured by its mortgage.

Reversed and remanded for further proceedings." (Appendix C, p. 40a.)

3. Remand to the Circuit Court

On remand to the circuit court, the case came before Judge Tom Okino, and he was immediately confronted with conflicting contentions as to the course that should be followed. Respondent argued that the Supreme Court of Hawaii, in reversing and remanding the case,

[3] The court, as shown above, readily admitted that the statute could be read very broadly, and made no attempt to cite any past authority for its new restrictive interpretation.

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intended to make a ruling to the effect that Petitioner was entitled to receive proceeds of the foreclosure sale to the extent necessary to satisfy its loans of $250,000 and $105,000 and that the balance remaining should, to the extent necessary, be applied to satisfy Respondent's loans. Petitioner took the position, on the other hand, that it was now necessary for the circuit court to conduct a new trial and receive evidence on the question of whether Petitioner's loans were related to the same transaction or series of transactions as the $250,000 advance expressly secured by Petitioner's mortgage instrument. Petitioner pointed out that it had made several offers of proof at the original trial to show that its four advances were parts of "one big loan" and "one transaction",[4] but that they had been rejected as

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[4] That there can be no doubt of the specificity of the offers of proof is shown by the following statements of Petitioner's attorney, taken from the transcript of the original trial:

"I offer to prove that the loan made to Akamine and Sons Limited of $250,000 and the loan made under the continuing line of credit of $190,000 to Val Super Market which was endorsed by Akamine and Sons were part and parcel of one loan, which permitted the bank to lend the maximum under the law of $440,000 to two related entities, and that Akamine and Sons, Limited and Val Super Market, treated these two loans as one . . . ." (See Appendix A, p. 6a.)

• • • • • • • • •

"We offer to prove, your Honor, that though they were separate corporate entities [Val Super Market, Ltd. and Akamine & Sons, Ltd.], the monies went back and forth and that in fact, the original request came for a loan to the bank for . . . $440,000, which by the way . . . is composed of $250,000 on the mortgage and $190,000 on the continuing line of credit agreement which is the maximum permitted to be loaned by a bank to any related entities. And that these two mortgages, the chattel mortgage and the original mortgage on the land are part and parcel of one transaction, and that this was with their prior understanding. . . ." (See Appendix A, p. 6a.)

immaterial by the trial judge, who at that time, not having had the benefit of the Supreme Court of Hawaii's new interpretation, did not read the broadly worded clause or its authorizing statute in such a restrictive manner. In contending that a new trial, or at least an evidentiary hearing was necessary, Petitioner relied heavily on the constitutional protection of procedural due process of law.

Judge Okino, while readily agreeing with Respondent that it was the circuit court's duty to follow the mandate of the Supreme Court of Hawaii, nevertheless was of the same view as Petitioner that the mandate required that evidence tending to show that the loans made by Petitioner arose out of the same transaction or series of transactions be admitted during a new trial. Judge Okino reasoned:

> "It should go without saying that, in view of the fact that the 'same transaction rule' restricting the scope of the 'dragnet clause' was set down for the first time by the Supreme Court [of Hawaii], there has never been a necessity for a factual determination with respect to that issue at any previous state of these proceedings. It surely cannot be said that the Supreme Court of Hawaii intended to rule on the issue without either party having had benefit of a hearing thereon." (Appendix B, p. 14a.)

After holding the evidentiary hearing that he deemed constitutionally required, and on the basis of the evidence presented to him concerning the circumstances surrounding the making of the four loans by Petitioner, Judge Okino found that the loans "arose out of one and the same transaction, each being a part of a single plan of expansion of the operations of Val

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Super Market." (Appendix B, p. 20a.) Once again the sale proceeds of $449,000 were awarded to Petitioner.

4. Mandamus Proceedings

Respondent did not appeal from this decision, but instead filed a petition for writ of mandamus with the Supreme Court of Hawaii alleging that Judge Okino had failed to comply with the mandate of that court. The Supreme Court of Hawaii issued an order to Judge Okino to show cause why the petition for mandamus should not be granted. Petitioner was allowed to intervene in the mandamus proceeding. Briefs were filed and a hearing held, Judge Okino being represented by the Attorney General of Hawaii. This hearing involved only the question of what the previous mandate of the Supreme Court of Hawaii had been and in no way constituted a review of the evidence that had been presented to Judge Okino. In fact, no transcript of the evidentiary hearing held on remand was before the Supreme Court of Hawaii, and to this date, although the proceeding was transcribed, no formal transcript has been prepared.

The Supreme Court of Hawaii, by a three to two vote, held that its previous decision should have been read as a "final disposition of the funds in dispute between American Security and Hawaii National" (Appendix A, p. 2a), and that therefore its mandate had been violated and that a peremptory writ of mandamus would issue directing compliance. The majority rejected the constitutional basis of Judge Okino's decision on the ground that there was no factual issue left to decide which required a day in court:

> "The facts in *Akamine* could never have met that test [the same transaction or series of trans-

> actions]. . . . At bottom the objections raised are more properly addressed to the wisdom of restrictive statutory construction. Arguments such as those are surely jurisprudential, not constitutional." (Appendix A, p. 3a)

Thus, the majority held that Judge Okino had violated the original appellate mandate in the case, as they viewed it, by holding an evidentiary hearing. The issuance of the writ of mandamus effectively abrogated this entire phase of the case.[5]

The dissenters in the Supreme Court of Hawaii based their opinion on the constitutional grounds of procedural due process. They were also disturbed by the majority's failure even to mention a leading case of this Court which they, like Judge Okino, believed should control the decision in this case. Justice Kobayashi concisely stated the grounds of dissent as follows:

> "On these facts it is clear that Judge Okino's decision to allow relatedness to be tried was entirely proper, and indeed, it was constitutionally required because American Security Bank had not previously had an opportunity to try this issue. It certainly is not merely jurisprudential as the majority states! The constitutional requirement of an opportunity for a trial in the context of the present case is secured by the 14th Amendment to

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[5] The distinction between mandamus and appeal is critical here. Respondent did not appeal Judge Okino's decision and ask the Supreme Court of Hawaii to overrule him on the basis of the evidence that was presented on remand. Indeed, the Supreme Court of Hawaii did not even have a transcript of the remand proceeding before it. Rather, Respondent obtained a writ of mandamus, which can in no way be interpreted as a decision by the Supreme Court of Hawaii on the evidence, but was a simple order to Judge Okino to go back and follow the original appellate mandate in the case.

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the U. S. Constitution, and no less guaranteed by the Hawaii Constitution, Article I, Section 4. The case of *Saunders* v. *Shaw,* 244 U.S. 317 (1917) is directly in point. I am at a loss in comprehending the majority's failure to discuss it and disturbed and concerned in the majority's refusal to grant to appellant [Petitioner] the substantive right guaranteed by the U.S. Constitution and the State of Hawaii Constitution." (Appendix A, p. 7a.)

MANNER IN WHICH FEDERAL QUESTION WAS RAISED

It was after the Supreme Court of Hawaii gave its new interpretation to the Hawaii mortgage statute that Petitioner first advanced its procedural due process of law argument under the Fourteenth Amendment. See pp. 3-5 of Petitioner's "MEMORANDUM" filed with the First Circuit Court, dated January 31, 1969, which has been included with the record filed herein. Circuit Judge Okino who presided over the case on remand agreed with Petitioner's argument and, as pointed out on page 8, allowed Petitioner to submit its evidence on this basis.

Petitioner again argued the Federal constitutional issue of procedural due process of law under the Fourteenth Amendment before the Supreme Court of Hawaii in response to Respondent's application to that court for a writ of mandamus. See pp. 11-13 of Petitioner's "BRIEF ON BEHALF OF INTERVENOR" filed with the Supreme Court of Hawaii, dated September 5, 1969, which has been included with the record filed herein.

Petitioner renewed its constitutional argument in its "PETITION FOR REHEARING" (pp. 15-22) filed before the Supreme Court of Hawaii on November 24,

1969, which has been included with the record filed herein. This petition was dismissed without an opinion being written.

THE THREE TO TWO DECISION OF THE SUPREME COURT OF HAWAII DIRECTLY CONTRAVENES APPLICABLE DECISIONS OF THIS COURT ESTABLISHING A LITIGANT'S RIGHT TO PRESENT EVIDENCE ON THE ISSUES OF HIS CASE AS A FUNDAMENTAL REQUISITE OF PROCEDURAL DUE PROCESS OF LAW.

The violation of due process of law and disregard of established constitutional precedent are so clear in this case as properly to warrant summary reversal of the three to two decision reached by the court below. The majority of the Supreme Court of Hawaii has effectively denied Petitioner any opportunity to present its evidence on the controlling factual issue in its case—whether Petitioner's four loans involved the same transaction or series of transactions.[6]

The basis for the majority's refusal to hear Petitioner's evidence on the making of its loans was the completely unwarranted assumption that Petitioner would not be able to prove the facts required to show that its four loans involved the same transaction or series of transactions, even if given the opportunity. As support for its conclusion of nonrelatedness, the majority pointed to the following circumstances:

> "Not only were the parties in the first loan and the loan containing the dragnet clause (the second loan) different, but with respect to the fourth loan and the loan containing the dragnet clause,

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[6] It should be noted again that this denial was not based in any way on a failure of Petitioner to make a timely proffer of its evidence or on any other procedural failure on Petitioner's part. Petitioner specifically attempted to present evidence at the first trial to show that its advances were parts of "one transaction", but such evidence was rejected by the trial judge as being legally irrelevant under the then state of the law. See n. 4, *supra*.

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the operations themselves were quite distinct." (Appendix A, p. 3a.)

In effect, the majority opinion below sets forth a new rule of law that past and future loans can only be secured by the same mortgage instrument when they involve the same transaction or series of transactions and then proceeds to apply that rule without affording Petitioner any opportunity to prove the facts showing the legal and economic "oneness" of its loans.

The dissenting opinion recognizes these flaws in the majority decision and is acutely aware of how they flow from the unconstitutional defect of the denial of procedural due process of law:

> "A majority of this Court sees in the record an absolute warrant for its assumption that the mortgages in this case were unrelated. The majority says that because the second loan was to Akamine & Sons, Ltd., and the first is to Val Super Market, Ltd., they fail the test of relatedness. But surely American Security Bank is entitled to a chance to prove that 'Val Super Market, Ltd.' and 'Akamine & Sons, Ltd.' are synonyms. Surely the trial court is not bound by corporate veils! The majority says the operations involved in the second and fourth loans 'were quite distinct' notwithstanding that the second loan was to Akamine & Sons, Ltd., and the fourth was to both Akamine & Sons, Ltd. and to Val Super Markets, Ltd. This court has failed to articulate a test of relatedness and to explain how these mortgages failed to pass because of the obvious fact that the appellant [Petitioner] never had his day in court before the trial court and this appellate court has no power to try the issue in the first instance." (Appendix A, p. 8a.)

The most egregious aspect of the decision below is that it directly contravenes the basic constitutional rule of procedural due process applied to a similar situation by this Court in the case of *Saunders* v. *Shaw*, 244 U.S. 317 (1917). In that case, the owner of land against which a drainage tax had been assessed sought an injunction to prevent collection of the tax. At the trial he offered evidence to show that his land would not benefit from the levee system being constructed by the drainage commission, but this evidence was excluded as inadmissible upon objection of the defendant intervenor who held bonds payable out of the tax in question. Judgment was entered against the plaintiff. A rehearing was granted, however, and the court, observing that the answer and testimony showed that the land in dispute was low and marshy, had not been benefited or drained and could not be drained under the present system, reversed itself and entered judgment for the plaintiff. The intervening defendant thereupon applied for a rehearing, but the court declined to consider the application under its rule that only one rehearing should be granted. The Supreme Court of Louisiana affirmed the decision of the trial court.

On a writ of error brought by the intervening defendant, this Court reversed on grounds stated in the following passage from Mr. Justice Holmes' opinion for a unanimous Court:

> "He [the intervening defendant] now brings this writ of error and says that he has been deprived of due process of law, contrary to the 14th Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it

was not open to the plaintiff to show that his land was not benefitted, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The chief justice and Mr. Justice O'Neil [of the Louisiana Supreme Court] were of the opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the supreme court [of Louisana] thought that it was so plain on the uncontroverted facts that the case was within the principle of the Myles Salt Co. Case [7] that to remand it would be an empty form —a mere concesion to technicality. It may turn out so but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." 244 U.S. 317, 319.

The principle stated in this holding clearly required the Supreme Court of Hawaii, after placing its new construction on the Hawaii mortgage statute, to remand the case to the circuit court for an evidentiary hearing on the question of whether Petitioner's four loans did arise out of the same transaction or series of transactions.

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[7] In *Myles Salt Co.* v. *Bd. of Commissioners,* 239 U.S. 478 (1916), this Court held that an island which was high land and could not be benefited directly or indirectly by a drainage improvement, could not, consistently with the due process clause of the 14th Amendment, be included within a drainage district solely for the purpose of deriving revenue from the levy and collection of drainage taxes thereon.

The majority opinion of the Supreme Court of Hawaii, which fails to follow *Saunders* v. *Shaw*, or even to give it passing mention, will, if allowed to stand, cast doubt on the present authority of that decision and the line of cases following it. As will be seen from the discussion that follows, this Court has been vigilant through the years in protecting the kind of right to be heard that is at stake in the present case. The integrity of the rule of *Saunders* v. *Shaw* will be cast in doubt unless the majority opinion of the Supreme Court of Hawaii is reversed.

The present facts establish a stronger case for relief than those presented to this Court in *Saunders* v. *Shaw*. Not only in this case were several specific offers of proof made at the original trial to show that the advances in question involved "one big loan" and "one transaction", but, more significantly, when such evidence was actually allowed to be presented on remand, Judge Okino, the only judge who has yet had occasion to rule on such evidence,[8] found that it did indeed establish that the loans met the newly enunciated relatedness test handed down by the Supreme Court of Hawaii. When Petitioner was afforded the opportunity to present its evidence on remand, it was able to establish the fact that its four loans "arose out of one and the same transaction, each being a part of a single plan of expansion of the operations of Val Super Market."[9]

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[8] See n. 5, *supra*.

[9] Petitioner also showed that Akamine and Val Super Market were

> "... two closely held corporations ... created by members of the Akamine family, one to operate the markets and the other to hold the land on which the markets were located." (Appendix B, p. 18a.)

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(Appendix B, p. 20a.) Yet this phase of the case is completely disregarded by the majority below whose response to Petitioner's argument is the rather baffling statement that it is "jurisprudential, not constitutional."

As is readily apparent, this case involves much more than a dispute between two banks over the proceeds of a mortgage sale. The critical question that is presented by the decision of the court below is the extent to which an appellate court may deprive a litigant of his right to be heard and to submit evidence, on the bare assertion of a majority of the appellate court that the litigant could not prove his case even if given the opportunity.

The opportunity to be heard has been zealously protected by this Court throughout its history. It has been called "[t]he fundamental requisite of due process of law." *Grannis* v. *Ordean,* 234 U.S. 385, 394 (1914). See also *Mullane* v. *Central Hanover B. & T. Co.,* 339 U.S. 306, 314 (1950), and *Schroeder* v. *New York,* 371 U.S. 208, 212 (1962). It is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

The case of *Saunders* v. *Shaw, supra,* would be sufficient precedent in itself for granting this petition. Yet *Saunders* v. *Shaw* is by no means the only authority supporting Petitioner's position. This Court has not hesitated to enforce the constitutional right to be heard in other analogous situations.

For example, in the case of *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U.S. 673 (1929), the Supreme Court of Missouri ruled that the plaintiff, who was seeking to enjoin an allegedly discriminatory tax as-

sessment, should have filed its complaint with the state tax commission before delivering its tax books to the collector, and that since such procedure afforded an adequate remedy at law, the plaintiff was not entitled to equitable relief. This Court reversed the decision of the Missouri Supreme Court, pointing out that, according to a prior decision of that court, which had stood undisturbed until it was overruled by the court's present opinion in *Brinkerhoff-Faris,* the state tax commission did not have authority to grant relief in such cases. Plaintiff obviously could not have known of his remedy until it was too late to use it. As Mr. Justice Brandeis put it in his opinion for the Court:

> "It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense." 281 U.S. 673, 678

It is submitted that the effect of the majority decision below is exactly the same as that of the Missouri Supreme Court's decision held unconstitutional in the *Brinkerhoff-Faris* case. Because of the new construction given to the Hawaii mortgage statute, which requires that past and future loans arise out of the same transaction or series of transactions in order to be covered by the same mortgage instrument—a construction which was applied, for the first time ever at the appellate level in the present case—Petitioner never had the opportunity to present evidence on what thereby became the controlling issue in its case.

Another case in point is *Georgia R. & Electric Co.* v. *Decatur,* 295 U.S. 165 (1935). The city of Decatur, Georgia, filed a bill in equity seeking to recover an assessment from defendant, a street car operator, for

the paving of a street over which defendant's lines extended. Defendant resisted the assessment on the ground that the paving did not benefit its lines, but in fact was a detriment. It offered testimony to this effect, but, on objection, such testimony was excluded. The decision went against the defendant. This Court reversed on the following ground:

> "No question is raised as to the competency of the proof which was offered, and evidently there is none. The ruling was simply that it was immaterial. But the existence of benefits resulting from the improvement was material and was deemed so —else why require it, or why create an affirmative presumption in respect to it? Certainly, competent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; *and the refusal of a court to receive or consider any proof whatsoever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution.* 295 U.S. 165, 175 (emphasis added.)

The refusal of the majority of the Supreme Court of Hawaii to receive or consider any proof on the question of whether Petitioner's loans arose out of the same transaction or a series of transactions is directly contrary to the holding of the *Georgia Electric Co.* case, *supra.*

This Court has also held many times that statutory presumptions which do not allow a person the opportunity of rebuttal are violative of due process of law. For example, this Court has declared that:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity

> to repel it violates the due process clause of the 14th Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property." *Western A. R. Co.* v. *Henderson,* 279 U.S. 639, 642 (1929).

The conclusion of the majority below, that Petitioner could not meet the test of relatednes necessary to establish that its loans arose out of the same transaction or series of transactions is not only arbitrary, but it has been applied in such a manner as to deny Petitioner any opportunity to repel the assumptions on which it is based. Judicial fiat in determining issues of fact is just as violative of procedural due process of law as legislative fiat.

The cases cited above show clearly that the majority opinion of the Supreme Court of Hawaii is not in accord with, and indeed directly violates, well established constitutional doctrine of this Court guaranteeing to a litigant, as a matter of procedural due process of law, the opportunity to be heard and the right to present evidence on the issues of his case. This Court has not hesitated to act in the past to prevent any abridgement of the Federal constitutional right to be heard and has considered cases involving this right worthy of review on certiorari. For example, the opinion of Mr. Justice Douglas for the Court in *Helis* v. *Ward,* 308 U.S. 365 (1939), shows the importance this Court attaches to this fundamental constitutional right in exercising its discretionary power of review on petition for certiorari:

> "We granted certiorari, limited to the question whether a new trial should not have been granted, on the assertion that the failure to remand for a

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> new trial deprived petitioner of his day in court in violation of the rule of *Saunders* v. *Shaw*, ...
>
> * * * * * * * *
>
> "[R]eview by this Court was sought and granted on the ground that the Circuit Court of Appeals had decided the merits on facts not contained in the record and on a theory which had never been tried by the litigants." 308 U.S. 369, 370

Petitioner submits that the facts of this case, showing as they do a clear denial of procedural due process of law and failure to follow constitutional precedent, make it an even stronger case for this Court's review than those involving the same issue which the Court has reviewed in the past. Indeed, Petitioner sees no reason why this Court, based on its past decisions, should not grant certiorari and summarily reverse the decision of the court below. At the least, Petitioner believes that the erosion of this Court's prior rulings, which the decision of the court below represents, and which is likely to accelerate if the decision of the Court below is allowed to stand, not only warrants, but in this instance virtually seems to require, the exercise of this Court's discretion to review the case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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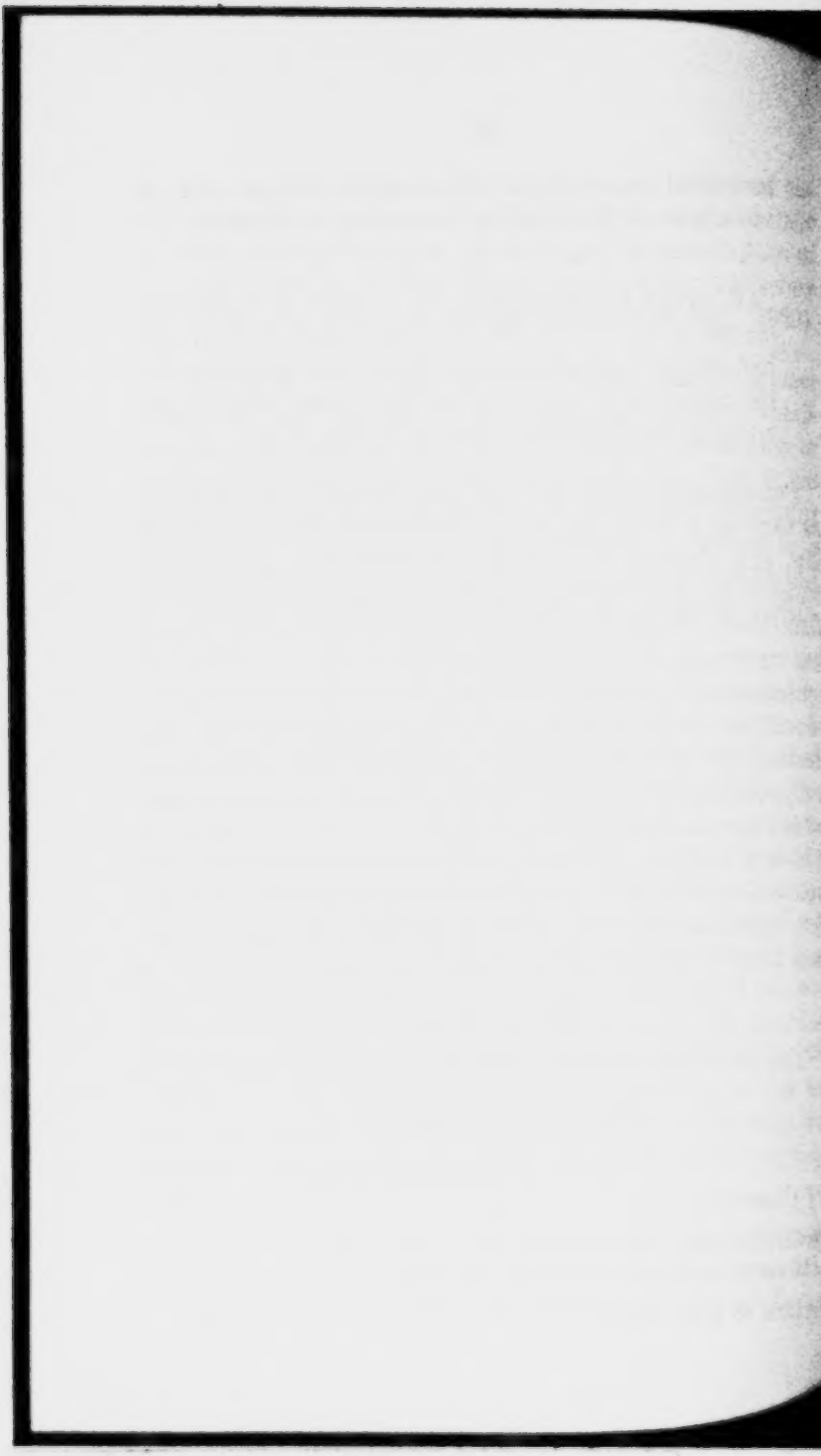
MARTIN & OPPENHEIMER

CHUCK & FUJIYAMA



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APPENDIX

APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1969

HAWAII NATIONAL BANK, HONOLULU

v.

TOM OKINO, CIRCUIT JUDGE, FIRST CIRCUIT COURT

No. 4904

PETITION FOR WRIT OF MANDAMUS
NOVEMBER 12, 1969

RICHARDSON, C.J., ABE, LEVINSON, KOBAYASHI, JJ., and CIRCUIT JUDGE KABUTAN in place of MARUMOTO, J., disqualified.

Mandamus—nature and grounds—scope of remedy.

Mandamus will issue directing a lower court to act where there is a duty to act and the slowness of ordinary legal remedies is likely to produce such a delay that the public good and the administration of justice will otherwise suffer.

Same—same—same.

Where there is an express and final disposition of a case by the Supreme Court and a remand to implement the decision, the lower court does not have discretion to remedy what it considers to be the supreme court's error.

OPINION OF THE COURT BY LEVINSON, J.

Petitioner, Hawaii National Bank, seeks a writ of mandamus commanding Respondent, Judge Tom Okino of the First Circuit Court, to follow and implement the decision of this court in *Akamine & Sons, Ltd.* v. *American Security Bank*, 50 Haw. 304, 440 P.2d 262 (1968), *rehearing denied* 50 Haw. 368 (1968). American Security Bank has inter-

vened in opposition to the petition for mandamus and alternative writ of mandamus.

In the *Akamine* case Hawaii National Bank intervened in an action by the mortgagor, Akamine & Sons, Ltd., to enjoin a sale by American Security under a power of sale given in a mortgage by the corporation to American Security containing a dragnet clause. We limited the enforceability of such clauses and then held quite explicitly and unambiguously that

> American Security is entitled to receive proceeds from the foreclosure sale sufficient to cover the unpaid balances of the original loan of $250,000 and the subsequent loan of $105,000 with interest, costs, attorney's fees and other expenses properly chargeable to it. Hawaii National is entitled to the proceeds remaining to the extent that they may be required to cover its loan secured by its mortgage. *Id.* at 313, 440 P.2d at 268.

A writ of mandamus will issue according to section 659-2 of the Hawaii Revised Statutes where "the slowness of ordinary legal forms is likely to produce such a delay, that the public good and the administration of justice will suffer from it. . . ." Where there is a duty to act the writ has been issued in prior cases before this court. *Marshall Construction Co.* v. *Bigelow,* 29 Haw. 48 (1926); *In re Sherwood,* 22 Haw. 381 (1914); *Harris* v. *Goodale, Collector General of Customs,* 2 Haw. 130 (1858). In this case we find that the jurisdictional basis for a writ of mandamus is present and that it was the duty of the lower court to comply with the mandate of our prior decision.

By the decision of this court in the *Akamine* case on appeal and the denial of rehearing, there was an express and final disposition of the funds in dispute between American Security and Hawaii National.

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Respondent, Judge Okino, and intervenor, American Security, assert that American Security will have been denied their day in court with respect to the question whether the loans in dispute were part of "the same transaction or series of transactions." This issue was raised on the petition for rehearing which was denied. It is not within the lower court's discretion to remedy subsequently any error which in its opinion might have been made by this court.

Furthermore, respondent and intervenor have evidently missed the thrust of our opinion in *Akamine*. In narrowly construing the dragnet clause and limiting it to loans involving the same transaction or series of transactions, we set down that test for those situations which are less than what was involved in *Akamine*. The facts in *Akamine* could never have met that test. Not only were the parties in the first loan and the loan containing the dragnet clause (the second loan) different, but with respect to the fourth loan and the loan containing the dragnet clause, the operations themselves were quite distinct. The loans in issue went to finance Val Super Market, Ltd., not Akamine & Sons, Ltd. Therefore no issue of fact was left to be resolved once the rule was set down. At bottom the objections raised are more properly addressed to the wisdom of restrictive statutory construction. Arguments such as those are surely jurisprudential, not constitutional.

The judgment filed by respondent, Judge Okino, on September 10, 1969 is hereby vacated. A peremptory writ of mandamus will be entered directing the respondent to enter a judgment first distributing to American Security Bank such portion of the proceeds from the foreclosure sale as is necessary to cover the unpaid balances of the original loan of $250,000 and the subsequent loan of $105,000 with interest, costs, attorney's fees and other expenses properly chargeable to said loans, not including any loans other than the aforesaid two loans, and secondly distributing the proceeds remaining to Hawaii National Bank to the extent that

they may be required to cover its loan secured by its mortgage.

Petition granted.

ARTHUR B. REINWALD (Anthony & Waddoups and Mau & Ho of counsel) for petitioner.

THOMAS M. PICO, JR., Deputy Attorney General (Bertram T. Kanbara, Attorney General, with him on the brief) for respondent, Judge Okino.

WALTER G. CHUCK (Chuck & Fujiyama of counsel) for intervenor, American Security Bank.

DISSENTING OPINION OF KOBAYASHI, J.

Judge Okino's action on the remand of *Akamine* was entirely proper, and the writ of mandamus here sought should be denied.

The facts of the case were related in some detail in 50 Haw. at 304-307. A brief reiteration will suffice for present purposes.

The Akamines and corporations under their control borrowed from American Security Bank a total of $585,000 in four loans. The dates, amounts and security of each loan were:

1. August 2, 1960; $190,000; mortgage on chattels not here relevant.

2. September 26, 1960; $250,000; mortgage on real property.

3. February 14, 1961; $105,000; an additional charge mortgage on the same real property as the second loan.

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4. August 22, 1962; $40,000; mortgage on different real property not here relevant.

The second mortgage contained a dragnet clause which purported to secure past and future loans "as additional charges against all the property hereby mortgaged. . . ."

In August and September 1962, the Akamines mortgaged the same real property to Hawaii National Bank.

The trial court held that all four of American Security Bank's loans were secured by the dragnet clause of the second mortgage on the authority of Act 255 S.L.H. 1939, now compiled as HRS § 506-1, which provided in pertinent part:

> A mortgage may secure the repayment of a past debt, a debt incurred at the time the mortgage is executed, or a debt incurred for advances which may be made by the mortgagee subsequent to the execution of the mortgage even though the mortgagee is under no contractual duty to make such advances . . .

On appeal this Court announced a new interpretation of this statute:

> [T]he statute does not require us to enforce a dragnet, or anaconda, clause in a mortgage as to debts or obligations not of the same kind as the specific principal debt or obligation for which the mortgage is given. Unless the prior or subsequent advance relates to the same transaction or series of transactions, the mortgage must specifically refer to it for the advance to be secured. . . .

The last two paragraphs of the Court's opinion were:

> American Security is entitled to receive proceeds from the foreclosure sale sufficient to cover the unpaid balances of the original loan of $250,000 and the subsequent loan of $105,000 . . . Hawaii National is en-

titled to the proceeds remaining to the extent that they may be required to cover its loan secured by its mortgage.

Reversed and remanded for further proceedings.

On remand Judge Okino was faced with considerable difficulty. The part of the opinion formulating a new test speaks prospectively, as though the evidence and contentions of the parties in the present case with respect to the issue of relatedness had not yet been heard. (In actuality, the issue of relatedness had not been tried, as it was irrelevant under the then prevailing law.[1] The final

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[1] In his decision, Judge Okino stated:

It should go without saying that, in view of the fact that the "same transaction rule" restricting the scope of the "dragnet clause" was set down for the first time by the Supreme Court, there has never been a necessity for a factual determination with respect to that issue at any previous state of these proceedings. It surely cannot be said that the Supreme Court intended to rule on the issue without either party having had benefit of a hearing thereon.

The record herein indicates, furthermore, that although the matter was not essential to its cause during the course of the first trial, Respondent did at that time make several offers to prove that all four of its loans arose out of the same transaction or series of transactions. Counsel for American Security said, at page 315, 11. 13-24 of the Transcript of the first trial:

"... We offer to prove, Your Honor, that though they were separate corporate entities, the monies went back and forth and that in fact, the original request came for a loan to the bank for, from the bank for $440,000, which by the way, is the difference between, is composed of $250,000 on the mortgage and $190,000 on the continuing line of credit agreement which is the maximum permitted to be loaned by a bank to any related entities. And that these two mortgages, the chattel mortgage and the original mortgage on the land are part and parcel of one transaction, and that this was with their understanding. with their prior understanding and with jurisdiction."

At page 316, 11. 15-21, the transcript reads:

"I offer to prove that the loan made to Akamine & Sons of $250,000 and the loan made under the continuing line of credit

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paragraphs of the opinion, however, speak as though this Court, an appellate court, had already determined that the first and fourth loans were not related to the second loan which contained the dragnet clause. To further confuse Judge Okino, this Court concluded in its opinion: "remanded for further proceedings." Judge Okino resolved this ambiguity and met the requirements of due process by allowing American Security Bank to try the issue of relatedness.

On these facts it is clear that Judge Okino's decision to allow relatedness to be tried was entirely proper, and indeed, it was constitutionally required because American Security Bank had not previously had an opportunity to try this issue. It certainly is not merely jurisprudential as the majority states! The constitutional requirement of an opportunity for a trial in the context of the present case is secured by the 14th Amendment to the U.S. Constitution, and no less guaranteed by the Hawaii Constitution, Article I, Section 4. The case of *Saunders* v. *Shaw,* 244 U.S. 317 (1917), is directly in point. I am at a loss in comprehending the majority's failure to discuss it and disturbed and concerned in the majority's refusal to grant to appellant the substantive right guaranteed by the U.S. Constitution and the State of Hawaii Constitution.

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of $190,000 to Val Super Market which was endorsed by Akamine & Sons were part and parcel of one loan, which permitted the bank to lend the maximum under the law of $440,000 to two related entities, and that Akamine & Sons, Ltd. and Val Super Market treated these two loans as one . . ."

Because it was of the opinion that the dragnet clause was entitled to a literal interpretation so as to encompass all prior and subsequent advances, the court refused to permit Respondent to introduce evidence tending to show that all four loans made by American Security to Akamine & Sons arose out of the same transaction or series of transactions. Of course, until the Supreme Court set down the rule of law restricting the scope of the dragnet clause, such evidence was, as the trial court said in rejecting Respondent's offers of proof, irrelevant.

If a case involving a dragnet clause were tried in which the trial court refused to allow a party to show the relatedness of a series of mortgages, this Court would have no difficulty in reversing. Yet this Court now states that, by its ambiguous decision in *Akamine* and by its denial without opinion of the motion for a rehearing the issue of relatedness is resolved against a party which has never had a chance to show relatedness.

A majority of this Court states: "The facts of *Akamine* could never have met that test." Even so, American Security Bank is constitutionally entitled to try. The United States Supreme Court has ruled:

> Probably the majority . . . thought that it was so plain on the uncontroverted facts . . . that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

[*Saunders* v. *Shaw*, 244 U.S. at 319 (Holmes 1917).]

A majority of this Court sees in the record an absolute warrant for its assumption that the mortgages in this case were unrelated. The majority says that because the second loan was to Akamine & Sons, Ltd., and the first is to Val Super Market, Ltd., they fail the test of relatedness. But surely American Security Bank is entitled to a chance to prove that "Val Super Market, Ltd." and "Akamine & Sons, Ltd." are synonyms. Surely the trial court is not bound by corporate veils! The majority says the operations involved in the second and fourth loans "were quite distinct," notwithstanding that the second loan was to Akamine & Sons, Ltd., and the fourth was to both Akamine & Sons, Ltd. and to Val Super Market, Ltd. This Court has failed to articulate a test of relatedness and to explain how

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these mortgages failed to pass because of the obvious fact that the appellant never had his day in court before the trial court and this appellate court has no power to try the issue in the first instance.

I believe the Court went too far in the *Akamine* opinion in attempting to resolve the facts of relatedness, which facts had not been tried. Rather than admit their error the majority opines "The facts of *Akamine* could never have met that test," and in a peremptory manner declares:

> It is not within the lower court's discretion to remedy subsequently any error which in its opinion might have been made by this court.

The majority abuses the power of the appellate court and the result to American Security Bank is a denial of fundamental rights guaranteed by the State of Hawaii and United States Constitutions.

Circuit Judge Toshio Kabutan joins in this dissent.

APPENDIX B

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

CIVIL NO. 15405

AKAMINE & SONS, LTD., a
Hawaii corporation,
Petitioner,

vs.

HAWAII NATIONAL BANK, HONOLULU,
Petitioner-Intervenor,

vs.

AMERICAN SECURITY BANK,
Respondent.

Decision

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

CIVIL NO. 15405

The instant action was instituted by Akamine & Sons, Ltd. to enjoin a sale by American Security Bank of certain parcels of real property owned by the Petitioner, the sale having been undertaken pursuant to a power of sale contained in a mortgage on the said realty conveyed by the Petitioner to American Security. Hawaii National Bank thereupon intervened, asserting a claim to the proceeds of the proposed sale.

The trial court denied the injunction and permitted the consummation of the sale, from which sale proceeds in the amount of approximately $449,000 were realized. The issue then remaining for consideration by the court involved the priority of the two banks to the proceeds.

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The claims of Hawaii National Bank arose out of three documents pursuant to which Akamine & Sons, Ltd. purported, during August and September, 1962, to mortgage the property which was the subject of the foreclosure sale. American Security's claims arose out of four loans made by it, to wit:

(1) A chattel mortgage and agreement, dated August 2, 1960, securing advances by American Security to Val Super Market, Ltd., a corporation for all intents and purposes solely owned by the Akamine family, up to a total of $190,000.00, the said indebtedness being guaranteed by Akamine & Sons, Ltd. The full $190,000.00 had been borrowed by Val prior to May 1, 1962.

(2) A mortgage on the property in question, dated September 26, 1960, securing a loan of $250,000.00 made by American Security Bank to Akamine & Sons, Ltd. The mortgage contained provisions to the effect that it would become void only after the mortgagor had satisfied the indebtedness of $250,000.00.

> "and shall discharge any and all obligations that now are or hereafter may be or become owing directly or contingently by the Mortgagor to the Mortgagee on any and every account whether or not the same are mature, of which obligations the books of the Mortgagee shall be prima facie evidence and which obligations it is agreed by these presents are and shall be secured as additional charges against all the property hereby mortgaged..."

The provision quoted above has sometimes been referred to as a "dragnet clause."

(3) A loan by American Security Bank to Akamine & Sons, Ltd. on February 14, 1961 in the amount of $105,000.00 evidenced by a promissory note and secured by an additional charge mortgage on the property secured by the aforementioned mortgage of September 26, 1960.

(4) On August 22, 1962, Val Super Market, Ltd. and Akamine & Sons, Ltd. borrowed $40,000.00 from American Security Bank to finance Val's operations. The indebtedness was secured by a mortgage on a parcel of land owned by Akamine & Sons, Ltd.

On the basis of its finding that all four loans made by American Security were secured by the property in question under the "dragnet clause" of the mortgage of September, 1960 and that American Security's claims were therefore prior to those of Hawaii National, the court awarded the entire proceeds of the foreclosure sale to American Security. Hawaii National thereupon appealed to the Supreme Court of Hawaii.

The Supreme Court reversed the decision of the trial court on the basis of its holding to the effect that the scope of the so-called "dragnet clause" would be restricted in such a manner that, "unless the prior or subsequent advance relates to the same transaction or series of transactions, the mortgage must specifically refer to it for the advance to be secured." *Akamine & Sons, Ltd., et al v. American Security Bank,* 50 Hawaii 304, 312, ... P. 2d ..... (1968). The cause was thereupon "remanded for further proceedings."

I. The Opinion of the Supreme Court Contains a Mandate to the Effect That This Court, Upon Remand, is to Make a Determination With Respect to Whether or Not the Four Loans Made by American Security Bank Arose Out of the Same Transaction or Series of Transactions.

Hawaii National Bank, the Intervenor herein, has throughout the course of this second trial advanced the argument that American Security Bank is not entitled to submit evidence of the fact that the four loans made by it to Akamine & Sons, Ltd. arose out of the same transaction or series of transactions. That contention has been

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based solely on the premise that it is the duty of the trial court, upon remand of a cause for "further proceedings", to follow the mandate of the appellate court in delimiting the scope of the new trial. It argues that the Supreme Court, in reversing and remanding the instant cause, intended to make a ruling to the effect that American Security was entitled to receive proceeds of the foreclosure sale to the extent necessary to satisfy its loans of $250,000.00 and $105,000.00, with interest, costs, attorney's fees and other expenses properly chargeable to it, and that the balance then remaining should be subjected first to the claims of Hawaii National Bank.

It should be noted at the outset that neither the Court nor Respondent American Security Bank has at any time denied that the trial court is bound to follow the mandate of the appellate court in a proceeding such as the one at bar herein. It is my opinion, however, that the mandate of the Supreme Court requires that evidence tending to show that the loans made by Respondent arose out of the same transaction or series of transactions be admitted during this new trial.

The essence of the Supreme Court's opinion in the instant cause was its restricted interpretation with respect to the "dragnet clause" of the mortgage of September, 1960. The trial court had interpreted the clause literally in holding all prior and subsequent advances to be covered by the said mortgage. In reversing, the Supreme Court ruled that the clause was not to be given such all-encompassing effect and that, "unless the prior or subsequent advance relates to the same transaction or series of transactions, the mortgage must specifically refer to it for the advance to be secured."

Supra. It then ruled that:

> "American Security is entitled to receive proceeds from the foreclosure sale sufficient to cover the unpaid

> balances of the original loan of $250,000 and the subsequent loan of $105,000, with interest, costs, attorney's fees and other expenses properly chargeable to it. Hawaii National is entitled to the proceeds remaining to the extent that they may be required to cover its loan secured by its mortgage." *Supra,* at p. 313.

The cause was thereupon "Remanded for Further Proceedings."

It is the contention of Hawaii National that this court is obligated to follow the rule of law set down by the Supreme Court in defining the scope of the new trial. It argues that evidence with respect to the "same transaction" issue is beyond the proper scope of the new trial and "violative of 'the rule of the law of the case' which is a well settled doctrine of law in this jurisdiction. *Mid-Pacific Dress Mfg. Co.* v. *Cadinha,* 36 H. 732 (1944; *Eastern Iron & Metal Co., Ltd. v. Patterson et al.,* 40 H. 382 (1953)." This court cannot concur in that assertion.

The rule of law set down by the Supreme Court was that the "dragnet clause" was effective to secure prior to subsequent advances, without express references thereto, only if the said prior or subsequent advances arose out of the "same transaction or series of transactions". It is the duty of this court, in following the mandate of the Supreme Court, to apply that rule to the facts in question herein. It cannot be assumed, as Intervenor would have this court do, that the Supreme Court not only set down the rule of law but intended further to apply that rule by making findings of fact to the effect that American Security's four loans did not arise out of the "same transaction or series of transactions".

It should go without saying that, in view of the fact that the "same transaction rule" restricting the scope of the "dragnet clause" was set down for the first time by the Supreme Court, there has never been a necessity for a

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factual determination with respect to that issue at any previous state of these proceedings. *It surely cannot be said that the Supreme Court intended to rule on the issue without either party having had benefit of a hearing thereon.*

The record herein indicates, furthermore, that although the matter was not essential to its cause during the course of the first trial, Respondent did at that time make several offers to prove that all four of its loans arose out of the same transaction or series of transactions. Counsel for American Security said, at page 315, 11. 13-24 of the Transcript of the first trial:

> ". . . We offer to prove, Your Honor, that though they were separate corporate entities, the monies went back and forth and that in fact, the original request came for a loan to the bank for, from the bank for $440,000, which by the way, is the difference between, is composed of $250,000 on the mortgage and $190,000 on the continuing line of credit agreement which is the maximum permitted to be loaned by a bank to any related entities. And that these two mortgages, the chattel mortgage and the original mortgage on the land are part and parcel of one transaction, and that this was with their understanding, with their prior understanding and with jurisdiction."

At page 316, 11.15-21, the transcript reads:

> "I offer to prove that the loan made to Akamine & Sons of $250,000 and the loan made under the continuing line of credit of $190,000 to Val Super Market which was endorsed by Akamine & Sons were part and parcel of one loan, which permitted the bank to lend the maximum under the law of $440,000 to two related entities, and that Akamine & Sons, Ltd. and Val Super Market treated these two loans as one . . ."

Because it was of the opinion that the dragnet clause was entitled to a literal interpretation so as to encompass all prior and subsequent advances, the court refused to permit Respondent to introduce evidence tending to show that all four loans made by American Security to Akamine & Sons arose out of the same transaction or series of transactions. Of course, until the Supreme Court set down the rule of law restricting the scope of the dragnet clause, such evidence was, as the trial court said in rejecting Respondent's offers of proof, irrelevant.

In view of the fact, then, that neither party has had an opportunity to be heard on the "same transaction" issue, if only for the reason that it was not an issue herein until the rule was set forth by the Supreme Court, it must be concluded that the Supreme Court did not intend to rule that American Security's claims with respect to the loans of $190,000 and $40,000 did not arise out of the same transaction or series of transactions, were therefore not within the scope of the dragnet clause and thus junior to the claims of Hawaii National Bank. For the court to have done so would have been to deny Respondent its rights under the due process provisions of the Constitutions of the United States and the State of Hawaii. See Amendment XIV, *Constitution of the United States;* Article I, Section 4, *Constitution of the State of Hawaii.*

It has been held a denial of due process of law for a State Supreme Court to reverse a decision and render judgment absolute against the party who succeeded in the trial court, upon a proposition of fact which was ruled to be immaterial at the trial and concerning which he had therefore no occasion and no opportunity to introduce his evidence. *Saunders v. Shaw,* 244 U.S. 317 (1917). That opinion of the Supreme Court of the United States dealt with the very issue involved in the instant proceeding. The denial of a judicial hearing is a violation of due process. *Georgia Railway Electric Co. v. Decatur,* 295 U.S. 165,

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171 (1935), citing *Saunders, supra; Walker Mining Co. v. Industrial Accident Commission,* 95 P. 2d 188, 190 (1930), citing *Saunders, supra.*

It should also be pointed out that the trial court, during the first trial, awarded the entire proceeds of the foreclosure sale to American Security on the basis of the dragnet clause, without passing upon the claims asserted by Hawaii National. This is to say that at no stage of these proceedings has the legal validity or sufficiency of Intervenor's claims been ruled upon. This court cannot believe that the Supreme Court intended to award any part of the proceeds to Hawaii National without a judicial determination with respect to the validity of its claims.

For the foregoing reasons, I am of the opinion that the Supreme Court intended to set down a rule of law delimiting the scope of the so-called "dragnet clause" without applying the rule to the facts involved herein. Of course, the property subject to the foreclosure sale secured the loans of $250,000 and $105,000 by virtue of the mortgage of September, 1960 and the additional charge thereon of February 14, 1961, and, as the Supreme Court stated, American Security is entitled to have those claims satisfied out of the proceeds now before the court without regard to the dragnet clause. It is with respect to the loans of $190,000 and $40,000 that the scope of the dragnet clause must be factually determined by the application of the Supreme Court's "same transaction" rule. It is the ruling of this court, therefore, that American Security Bank is entitled herein to prove that the four loans made by it directly or indirectly to Akamine & Sons, Ltd. arose out of the same transaction or series of transactions.

II. THE FOUR LOANS MADE BY AMERICAN SECURITY BANK AROSE OUT OF THE SAME TRANSACTION OR SERIES OF TRANSACTIONS AND ARE THEREFORE SECURED BY THE MORTGAGE OF SEPTEMBER 26, 1960.

The record herein indicates that Val Super Market, Ltd. and Akamine & Sons, Ltd. were interrelated in more respects than common ownership. It appears that Val operated several super markets which were located on land held by Akamine & Sons. This is to say that two closely held corporations were created by members of the Akamine family, one to operate the markets and the other to hold the land on which the markets were located.

There is also evidence to the effect that the series of four loans made by American Security all constituted parts of a plan whereby the operations of Val Super Market, Ltd., and therefore Akamine & Sons, Ltd., were to be expanded by the addition of two new stores. Ichiro Akamine and Eliot Wong, the representative of American Security who was involved in these transactions with Val and Akamine & Sons, both testified that all parties involved understood that to be the case.

The testimony was to the effect that, because of their plans for expansion, the Akamines sought additional capital by way of loans from American Security. There existed at that time, an open line of credit in favor of Val which was secured by a chattel mortgage and the guarantee of Akamine & Sons, Ltd. It was agreed that more money would be loaned by American Security to Val and Akamine & Sons by means of the extension of the line of credit mentioned above and by other loans as the need for more capital arose.

It was also understood at that point that additional security would be required for the subsequent advances. It

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was as a result of these negotiations that the series of loans in question were made by American Security Bank. In this series the open line of credit was increased to a ceiling of $190,000; a loan of $250,000 was made on September 26, 1960 and secured by a mortgage on the land which was subsequently subjected to the foreclosure sale involved herein; a loan of $105,000 was made on February 14, 1961 and secured by an additional charge mortgage on the property secured under the mortgage of September 26, 1960; and an advance of $40,000 was made on August 22, 1962. The record indicates that no additional charge was taken in this latter instance. The property in question was at the time mortgaged to the extent of 75% of its value, the legal limit.

In any event, it appears clearly that regardless of which entity was primarily liable on each of the debts, all of the money loaned by American Security Bank was immediately channeled toward the operations of Val Super Market, Ltd. Indeed, Exhibits AA and BB indicate that money loaned by American Security to Akamine & Sons was immediately transferred to the account of Val Super Market.

It should be noted that Ichiro Akamine, an officer of both entities and the party who carried on all negotiations with respect to the four loans on behalf of both Akamine & Sons and Val, testified to the effect that it was his understanding throughout the loan negotiations that all the money secured under the loans was to be used for the purpose outlined above and that all four loans were part of the same transaction. That understanding was shared by Eliot Wong, the representative of American Security Bank.

It should further be noted with emphasis that the testimony of Ichiro Akamine and Eliot Wong, as outlined above, was entirely unrebutted by Intervenor, which propounded absolutely no independent evidence on its behalf

on the "same transaction" issue and, on cross examination of the said two witnesses, failed to elicit any evidence favorable to its cause herein.

If, then, the rule of law governing the case at bar is that prior and subsequent advances are secured by the so-called "dragnet clause" if they arise out of the same transaction or series of transactions, I am of the opinion that the four loans made by Respondent, American Security Bank, are secured by its mortgage of September 26, 1960 which contained such a "dragnet clause" by virtue of the fact that they arose out of one and the same transaction, each being a part of a single plan of expansion of the operations of Val Super Market. On that basis, American Security Bank is entitled to the proceeds presently before the court to the extent necessary to satisfy its claims arising out of the loans of $190,000, $40,000, $250,000 and $105,000, with interest, costs, attorneys' fees and other expenses properly chargeable to it.

III. ASSUMING ARGUENDO THAT THE CLAIMS OF HAWAII NATIONAL BANK ARE PRIOR TO AMERICAN SECURITY'S CLAIMS WITH RESPECT TO ITS LOANS OF $190,000 AND $40,000, IT MAY NOT RESORT TO THE PROCEEDS OF THE FORECLOSURE SALE WITHOUT FIRST RESORTING TO OTHER REMEDIES AVAILABLE TO IT.

During the course of the instant proceeding, evidence has been introduced to the effect that Hawaii National possesses security other than the fund now before the court which is more than adequate to fully satisfy the claims it asserts in the instant action. It has been shown that Intervenor presently has recourse to the following additional security:

1. Mortgage of a residence owned by George and Lily Y. Akamine.

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2. Assignment by Ichiro Akamine, Akino Akamine, George Akamine, Lily Y. Akamine, Sotaro Akamine and Katsuko Akamine of all of their right, title and interest in and to a certain Agreement of Sale, dated December 11, 1957 and recorded in the Bureau of Conveyances, State of Hawaii in Liber 3358, at page 336; (Exhibit)

3. Assignment by Ichiro Akamine, Akino Akamine, George Akamine and Lily Y. Akamine of all their right, title and interest in and to a certain Agreement of Sale, dated December 8, 1958, recorded in said Bureau of Conveyances in Liber 3529, at page 294; (Exhibit FF)

4. Assignment of Accounts Receivable by Fixtures Hawaii, Inc., to Hawaii National Bank, dated November 13, 1962; (Exhibits HH and FF)

5. Agreement by Industrial Investors, Inc., and entity owned in large part by members of the family of K. J. Luke, President of Hawaii National Bank, to indemnify Intervenor from loss with respect to the loan of $50,000 made by Intervenor to Atlas Land Company, evidenced in part by letter dated August 20, 1963; (Exhibit P)

6. Continuing General Guaranty of George Akamine, Lily Akamine, Sotaro Akamine, Katsuko Akamine, Ichiro Akamine, James Akamine and Jean Akamine guaranteeing the repayment of any indebtedness of Matthews & Associates, Inc. to Hawaii National Bank. (Exhibit 4)

It appears, then, that Hawaii National is in a position to make itself whole with respect to the claims it asserts herein without recourse to the fund now before the court. The Doctrine of Marshaling Assets arises out of the equitable principle that a creditor having recourse to two funds to satisfy his demand shall not, by his election, disappoint a party who has only one of the funds upon which to rely. He may not, therefore, exercise his right of recourse against the property or assets in question in an unreasonable manner or so as to satisfy his claim to the exclusion

of such other claimants. See 35 Am. Jur., *Marshaling Assets . . .*, Section 2; 2 *Jones on Mortgages,* (8th Ed.), Section 900, p. 239; *Osborne on Mortgages,* Section 288 (1951); *Pomeroy, Equity Juris.* (4th Ed.), Section 1414. It has been stated:

> "If a prior mortgagee has taken collateral security for the mortgage debt, a subsequent mortgagee may compel him to apply the proceeds of such collateral to the discharge of such debt before resorting to the mortgaged land; . . ." 2 *Jones, supra,* Section 1118, at page 568.

It can be seen that the doctrine of marshaling assets is applied in equity to "prevent the caprice of the doubly secured creditor . . . from determining where the loss shall fall . . ." *Osborne on Mortgages, supra.*

The fund under consideration herein is insufficient to completely satisfy the claims of both American Security and Hawaii National. While American Security's recourse is against this fund only, Hawaii National has, as the record indicates, to the collateral security enumerated hereinabove. Assuming arguendo that the claims of Hawaii National Bank are held to be prior to American Security's claims arising out of the loans of $190,000 and $40,000, those claims would be forever lost to Respondent, since, as has been said, it has no other recourse for the satisfaction of those debts. If, however, the doctrine of marshaling assets is applied so as to compel Hawaii National to resort first to the other security it holds, leaving American Security to satisfy its claims out of the fund in question herein, both creditors would be made whole.

The collateral security available to Hawaii National represents unequivocable obligations of co-sureties of Akamine & Sons, Ltd. with respect to the debts of Fixtures Hawaii, Inc. and Atlas Land Company. Intervenor argues that marshaling is not permitted with respect to collateral

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security in the form of the obligation of a surety. That rule, however, is applicable only in cases in which a junior creditor seeks to have a prior creditor resort to the obligation of a surety before he proceeds against the property of the primary debtor.

It can be stated as a general proposition that:

> "The surety has a prevailing equity, enforceable by way of subrogation to the position of the paramount creditor, and the doctrine of marshaling assets shall not be applied to the prejudice of the surety and his property taken before resort is made to the assets of the debtor primarily liable." *Mason* v. *Hull,* 55 Ohio St. 256, 45 N.E. 632.

This is to say that principles of Suretyship give the surety the equitable right to have the property of the principal debtor applied to the satisfaction of the debt to the exoneration of his own obligation; or, if he should be compelled to pay it, to be subrogated to the rights of the creditor and have recourse to the property of the principal debtor. There is, then, as between the surety and the principal debtor, a priority in favor of the surety. The doctrine of Marshaling Assets is not applied under those circumstances for the reason that to require the prior creditor to resort first to the property of the surety would result in the suretys' being subrogated to the rights of the prior creditor with respect to the property of the principal debtor. The junior creditor, whose only claims is against the property of the principal debtor, would be junior to the surety and have nothing to proceed against in any event.

In the instant case, American Security Bank, assuming for the purposes of argument that the claims of Hawaii National are prior to its claims with respect to the loans of $190,000.00 and $40,000.00, seeks to compel Intervenor to resort to the property of co-sureties (Industrial Investors, George Akamine, et al.) before resorting to the

property of a co-surety (Akamine & Sons, Ltd.). As between co-sureties, I see no basis for giving priority to one or the other. They are jointly and severally liable on the debt and, of course, it cannot be said that such sureties would be unreasonably prejudiced by being required to satisfy an obligation for which they received consideration and are unequivocally bound to pay.

I am of the opinion, therefore, that if I were to hold that the four loans made by American Security Bank did not arise out of the same transaction or series of transactions and that its claims which arise out of the loans of $190,000.00 and $40,000 are therefore junior to those of Hawaii National, this is a proper case for the application of the doctrine of marshaling assets and that Hawaii National should be compelled to proceed against the collateral security available to it for the satisfaction of the claims it asserts hereinbefore resorting to the fund presently before the court.

I reach this decision after having taken all equitable considerations into account. Hawaii National has not denied the existence of the other security. Indeed, Exhibit Q, which is a memorandum for its own credit files indicates that, as early as September 9, 1964, it was protected, for an indebtedness of $96,882.42, by collateral security in the amount of $114,000.00. Such other security included the mortgage on George Akamine's home in which the net equity was $23,000; the interest of members of the Akamine family in certain Agreements of Sale, as set forth above, the estimated values of which amounted to $16,000.00 and $25,000.00; and the guaranty of Industrial Investors in the amount of $50,000.00. The memorandum further makes note of the fact that, "the total does not include guarantee value of $24,000 of Associated Drugs of Hawaii or the equity value of store properties encumbered by American Security Bank." (Exhibit Q)

The store properties referred to in the statement quoted above are, of course, those subject to the foreclosure and

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represented by the fund now before the court. A fact which in my opinion is worthy of consideration is that this "other" security is held by Hawaii National on account of obligations on which Fixtures Hawaii, Inc. and Matthews & Associates were primarily liable. It is on account of these same debts that the claims of Hawaii National are being asserted herein.

As a matter of fact, Akamine & Sons, Ltd., unlike its co-sureties on the debts of Fixtures Hawaii and Atlas Land Company, received no consideration for its obligations. This is to say that the guarantee of Akamine & Sons was given to Hawaii National for consideration which ran from Hawaii National to Fixtures Hawaii and Atlas Land Company, not to Akamine & Sons, Ltd. On the other hand, the individual Akamines and Industrial Investors did in fact receive consideration for their agreements to guarantee the debts of Fixtures Hawaii and Matthews & Associates. For example, the guarantee of Industrial Investors, Inc. was given to Hawaii National as a condition of a loan by Hawaii National to Atlas Land Company, the proceeds of which loan were used by Atlas to prepay rent to Industrial Investors, its landlord. It surely cannot be denied that the prepayment of rent where there is no obligation to do so constitutes consideration to a landlord.

In any event, both Fixtures Hawaii, Inc. and Matthews & Associates have been insolvent and defunct since as early as 1967. It is interesting to note, however, that Hawaii National Bank has asserted claims against the property of one surety, Akamine & Sons, Ltd., but has failed to take any action whatsoever against any other surety on the debts of the two defunct entities. This is to say that it has never sought recourse on the mortgage on George Akamine's home or the guarantee of Industrial Investors, Inc. While it did, in 1967, realize $8,532.45 as a result of the sale of the interests of George Akamine, Lily Akamine, Ichiro Akamine and Akino Akamine under the abovemen-

tioned Agreement of Sale dated December 8, 1958, that amount was not credited to the indebtedness of the Akamines and their closely held entities until after that fact was discovered during the taking of a deposition of one of its officers shortly before the instant proceedings began, in 1969.

For all intents and purposes, Hawaii National has taken no action toward the satisfaction of their claims besides that which it has taken in the instant proceedings. It is my opinion that the instant case is one in which Hawaii National, if it should prevail herein with respect to the proceeds of the foreclosure sale to the exclusion of American Security Bank, would be determining, pursuant to its own caprice, where the loss shall fall. This is to say that it would be in a position where, in effect, it could permit a bona fide creditor to be left without recourse for the satisfaction of its claims and bona fide debtors (the sureties) to avoid performance of their obligations.

As has been stated herein, such a situation is the very one in which the doctrine of marshaling assets is intended to apply. Where the application of the doctrine will operate so as to permit both creditors to be made whole without resulting in unreasonable prejudice to anyone, it appears to this court that equitable considerations require that it be applied.

In deciding herein that the doctrine of marshaling assets is applicable in the instant case, the court is aware of the fact that the aforementioned guarantee of Industrial Investors is evidenced by a letter dated August 20, 1963. (Exhibit P). If the applicable statute of limitations on such an obligation is six years, the guarantee would become unenforceable soon after the date hereof. It should perhaps be noted at this point that, although the doctrine of marshaling assets is not essential to the outcome of this case with respect to the distribution of the fund presently

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before this court in the sense that all of the claims of American Security Bank have herein been held to have been secured by the mortgage of September, 1960 and prior to the claims asserted by Hawaii National Bank, Intervenor could be held to be on such notice that a prudent and equitable course of action would be for it to proceed on the aforementioned guarantee prior to the running of the statute of limitations.

IV. INTERVENOR'S OBJECTIONS TO THE ADMISSION OF EVIDENCE OF "UNCLEAN HANDS" ON ITS PART AND TENDING TO SHOW THAT THE CLAIMS ASSERTED BY IT HEREIN REPRESENTED ULTRA VIRES ACTS ON THE PART OF AKAMINE & SONS, LTD. ARE SUSTAINED.

During the course of the trial, Respondent introduced evidence through which it sought to prove that Intervenor's claims should not be given effect herein because, (1) the equitable doctrine of "unclean hands" prevented the court from giving relief to Hawaii National which, it was alleged, was guilty of certain instances of inequitable conduct, and (2) the obligations upon which Intervenor's claims were based constituted ultra vires acts on the part of officers of Akamine & Sons, Ltd. so that such claims were unenforceable in these proceedings. Counsel for Intervenor objected to the relevancy of such evidence and the court ruled that it would hear such evidence, subject to further consideration. I said at that time that I would grant a motion to strike if, upon further consideration, I was of the opinion that the evidence objected to was not proper for consideration herein.

I am prepared now to grant such a motion to strike with respect to any and all evidence introduced during the trial relating in any manner to the two issues outlined above. This is to say that I have excluded from consideration by me in arriving at this decision, all evidence which was

objected to by counsel for Intervenor as relating to either of the two specified issues, i.e., "unclean hands" and ultra vires, and on that basis being irrelevant to the instant cause.

V. ATTORNEYS' FEES TO BE SET AND AWARDED TO RESPONDENT AMERICAN SECURITY AFTER A HEARING WHICH SHALL BE CALLED BY THIS COURT FOR THAT PURPOSE.

I shall be prepared to award reasonable attorney's fees to American Security Bank after a hearing which I shall call for that specific purpose at some future date.

Dated: Honolulu, Hawaii, July 11, 1969.

TOM OKINO
Judge of the Above Entitled Court

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

H. Seto
Clerk, Circuit Court, First Judicial Circuit
State of Hawaii

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APPENDIX C

IN THE SUPREME COURT OF THE STATE OF HAWAII,
OCTOBER TERM 1967.

AKAMINE & SONS, LTD., A HAWAII CORPORATION, AND HAWAII NATIONAL BANK, HONOLULU v. AMERICAN SECURITY BANK.

No. 4575.

APPEAL FROM FIRST CIRCUIT COURT
HON. JOHN F. DYER, JUDGE.
APRIL 25, 1968.

RICHARDSON, C. J., MIZUHA, ABE AND LEVINSON, JJ., AND CIRCUIT JUDGE LAURETA IN PLACE OF MARUMOTO, J., DISQUALIFIED.

Acknowledgment—statutory provisions—substantial compliance.

An acknowledgment is valid as long as it complies substantially with the requirements of the statute.

Same—same—clerical error.

A clerical error misstating the name of the party acknowledging an instrument is insufficient to establish failure to comply with the statutory requirement of acknowledgment.

Evidence—parol evidence rule—applicability to stranger to document.

The parol evidence rule is a principle of substantive law and must be applied in any action where the issue involved is what rights or duties were created by the instrument even if a party to the action was a stranger to the document.

Mortgages—future advances—limited coverage.

The statute authorizing mortgages to secure future advances permits a mortgage containing a dragnet clause to secure debts not specifically mentioned only if they relate to the same transaction or series of transactions described in the mortgage.

OPINION OF THE COURT BY LEVINSON, J.

This action was instituted by Akamine & Sons, Ltd. to enjoin a sale by American Security Bank under a power of sale given in a mortgage by the corporation to American Security. Hawaii National Bank intervened. After the trial court denied the injunction, the only issue remaining in the case was the priority of the two banks to the proceeds from the sale. The trial court awarded the entire proceeds to American Security, and Hawaii National appealed. Akamine & Sons, Ltd. has not appealed.

On August 2, 1960, Val Super Market, Ltd., a corporation owned almost completely by the Akamine family, executed a chattel mortgage and agreement with American Security under which American Security agreed to lend Val an aggregate amount of $190,000. American Security retained the right to terminate the agreement as to any amounts not drawn at any time. As security for the loan, Val gave American Security a mortgage on

> All of the goods, wares, merchandise, furniture, fixtures and equipment, . . . together with additions, improvements, purchases and substitutions thereto and thereof which are now or may hereafter be made, whether the same be kept at the Mortgagor's principal place of business and place of storage. . . .

The agreement also contained the provision that Akamine & Sons, Ltd.,

> in consideration of the promise on the part of the Mortgagor as aforesaid and in order to induce the

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> Mortgagee to make such loans, does hereby covenant and agree to and with the Mortgagee that it will guarantee and indorse any and all promissory note or notes evidencing any advances made to the Mortgagor . . . and further agrees that it will guarantee to repay all of said sums according to the terms of the said notes evidencing such loans, whether or not it has indorsed any of said notes. . . .

The agreement was signed by two officers of Akamine & Sons, Ltd. Although the record is unclear as to how and when the money was advanced, by May 1, 1962, Val had borrowed the full $190,000, as evidenced by its promissory note for that amount. The note stated that it was secured by the chattel mortgage and agreement, the terms of which were incorporated in the note. The note was not signed by representatives of Akamine & Sons, Ltd. although Sotaro and George Akamine signed as officers of Val.

On September 26, 1960, Akamine & Sons, Ltd. borrowed $250,000 from American Security. The debt was evidenced by a promissory note and secured by a mortgage on several parcels of real property. The mortgage provided that it would become void only after the mortgagor had discharged the obligation on the note for the $250,000 loan.

> and shall discharge any and all obligations that now are or hereafter may be or become owing directly or contingently by the Mortgagor to the Mortgagee on any and every account whether or not the same are mature, of which obligations the books of the Mortgagee shall be prima facie evidence and which obligations it is agreed by these presents are and shall be secured as additional charges against all the property hereby mortgaged . . . .

This mortgage made no specific reference to the August 2 chattel mortgage and agreement.

The September 26 mortgage stated that "Akamine & Sons, Ltd." was the mortgagor; it was signed by Sotaro and George Akamine as officers of "Akamine & Sons, Ltd."; but the acknowledgment signed by the notary referred to the corporation as "Arakawa & Sons, Ltd." The acknowledgment contained the names of Sotaro and George Akamine and also stated that the seal affixed to the mortgage "is the corporate seal of said corporation". The seal was the Akamine & Sons, Ltd. corporate seal. The mortgage was recorded in the Office of the Assistant Registrar of the Land Court and in the Bureau of Conveyances.

On February 14, 1961, American Security loaned Akamine & Sons, Ltd. $105,000. The corporation gave American Security a promissory note and an additional charge mortgage which provided that this loan was secured by the property secured in the mortgage between the same parties dated September 26, 1960.[1] The additional charge mortgage was recorded in the Office of the Assistant Registrar of the Land Court and in the Bureau of Conveyances.

On August 22, 1962, Val and Akamine & Sons, Ltd. borrowed $40,000 from American Security to finance Val's operations. As security, Akamine & Sons, Ltd. gave American Security a mortgage on a lot it owned in Waimalu and Val agreed to use $40,000 from sales at Val's Ewa store to pay off the loan.

In August and September 1962, Akamine & Sons, Ltd., by three documents mortgaged to Hawaii National the same property covered by American Security's mortgage of September 26, 1960. The consideration for the mortgages to Hawaii National was its forbearance from suing on over-

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[1] The February 14 mortgage provided that the mortgagor does hereby make said additional loan of ONE HUNDRED FIVE THOUSAND AND NO/100 DOLLARS ($105,000.00) an additional charge upon the said original mortgage and upon the property described in said original mortgage.

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due promissory notes of several corporations owned by the Akamines and which notes were endorsed by members of the Akamine family, as individuals.

On January 23, 1963, American Security, Val, Akamine & Sons, Ltd., another corporation owned by the Akamines, and four of the Akamines as individuals executed an agreement which gave American Security the power to sell enumerated pieces of property, including some covered by the September 26, 1960 mortgage.

In July, 1963, Val defaulted on the $190,000 loan. American Security took no legal steps to recover from Val. On September 28, 1964, Val was declared bankrupt.

The trial court held that all of American Security's loans to Akamine & Sons, Ltd. and to Val were secured by the September 26 mortgage. Hawaii National alleges that the trial court committed three errors. First, Hawaii National argues that the mortgage was not entitled to be recorded because of a defective acknowledgment. Second, it argues that the trial court erred in refusing to admit parol evidence of the intention of George Akamine as to what debts were to be secured by the September 26 mortgage. Third, it argues that the trial court erred in holding that the mortgage covered the $190,000 loan to Val and the $40,000 loan to Akamine & Sons, Ltd. and Val.

1. The Defective Acknowledgment

To accept Hawaii National's contention that the typographical error of referring to "Arakawa & Sons, Ltd." rather than to "Akamine & Sons, Ltd." invalidated the acknowledgment would be to subordinate reality to technicality. To be entitled to recording, a conveyance must be acknowledged, R.L.H. 1955, § 343-25. A certificate of acknowledgement need only

> state in substance that the person who executed the instrument appeared before the officer granting the

> certificate and acknowledged or stated that he executed the same, and that such person was personally known to the officer granting such certificate to be the person whose name is subscribed to the instrument as a party thereto.... R.L.H. 1955, § 343-26.

An acknowledgment is valid as long as it complies *substantially* with the statute, *Hawaiian Trust & Inv. Co.* v. *Barton*, 16 Haw. 294 (1904). Hawaii National cites no cases in Hawaii dealing with mistakes in transcribing the name of the mortgagor. Whatever validity might remain in *Lalakea* v. *Hilo Sugar Co.*, 15 Haw. 570 (1904), it it inapplicable here because the defect there was the failure of the acknowledgement to indicate that the persons acknowledged execution of the mortgage.

Reading the acknowledgment and the mortgage together, it is apparent that the substitution was a mere clerical error which does not interfere with the effect of recorded conveyances. The persons making the acknowledgment also signed the mortgage in the same representative capacities. The acknowledgment stated that the seal was that of the corporation on whose behalf the persons were acknowledging execution of the mortgage. The seal was the seal of Akamine & Sons, Ltd. Looking to external evidence, the notary's records showed that the corporation which was represented was "Akamine & Sons, Ltd." Finally, there is no allegation that Hawaii National was prejudiced by the error. In these circumstances, we agree with the trial court that

> to hold that there is no constructive notice because of an obvious clerical error in the acknowledgment where the mortgage has in fact been accepted for recordation and recorded violates common sense.

The acknowledgment was sufficient under the statute's standard of substantiality.

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2. *Exclusion of Parol Evidence*

Hawaii National contends that the trial court erred in excluding testimony by George Akamine as to the debts he intended the September 26 mortgage to cover. The trial court rejected its contention that the parol evidence rule is inapplicable where the evidence is offered by a stranger to the instrument. We agree.

We are mindful of statements in many opinions, *e.g.*, *In re Shield Bros.*, 134 Iowa 599, 111 N.W. 963 (1907), that:

> As against a stranger to the contract, a party thereto may assert that the agreement was other or different—in any respect and to any extent—than that which the writing imports. *Supra* at 600, 111 N.W. at 963.

At least one treatise adopts this approach.[2] But with rare exceptions, the cases do little more than state that "this is a fundamental doctrine". *Livingston* v. *Stevens*, 122 Iowa 62, 67, 94 N.W. 925, 926 (1903). The only case Hawaii National cites which contains even a general statement of reasons is *Bruce* v. *John L. Roper Lumber Co.*, 87 Va. 381, 13 S.E. 153 (1891). The opinion quotes from 1 Greenleaf, *Evidence* § 279 to the effect that strangers

> might be prejudiced by things recited in the writings contrary to the truth, through the ignorance, carelessness, or fraud of the parties . . . . Quoted *supra* at 383, 13 S.E. at 153.

Furthermore, most cases in which the exception in favor of strangers is invoked involve situations in which parties to the instrument could have introduced parol evidence under one of the well-recognized exceptions to the parol evidence rule.

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[2] 2 Jones, *Evidence* 928-30 (5th ed. 1958).

An examination of the purpose and nature of the parol evidence rule requires us to apply it in any case where the issue involved is what rights or duties were created by the instrument. 3 Corbin, *Contracts* 572-78 (Rev'd. 1960); 9 Wigmore, *Evidence* 149-51 (3rd ed. 1940); 4 Williston, *Contracts* 1154-67 (3rd ed. 1961). The parol evidence rule is a principle of substantive law and not a rule of evidence, *Midkiff v. Castle & Cooke, Inc.*, 45 Haw. 409, 422, 368 P.2d 887, 894 (1962). As a rule of substantive law, it determines the parties' legally enforceable contractual obligations.

> It must be remembered that the written contract represents the truth and the whole truth [as a matter of substantive law] of the contractual obligations of A and B in whatever way and between whatever parties an inquiry as to such obligations may become important. 4 Williston, *supra* at 1163.

Once the parties execute an instrument which contains their whole agreement, their previous negotiations and agreements are legally ineffective and evidence relating to those previous negotiations or agreements is irrelevant regardless of who offers it.

The alleged prejudice which might occur may be prevented by introduction of parol evidence by the stranger under any of the numerous exceptions to the parol evidence rule. A stranger could introduce parol evidence to prove that the written agreement is fraudulent as to him. In *Chang* v. *Meagher*, 40 Haw. 96 (1953), the defendant was a joint venturer under an agreement which stated that the joint venture began operation on August 1. The plaintiff was permitted to introduce parol evidence to establish that the joint venture had been operating before that time and the services the plaintiff performed in July, ostensibly for the other member of the joint venture as an individual, were rendered for the joint venture. Although the court stated the broad principle that the parol evidence rule does not apply to strangers to the instrument, we

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think that the decision is more soundly based on the right of a party or stranger to the instrument to show that the instrument is fraudulent.

The main issue in this case was the precise nature of the obligations secured by the mortgage, that is the relations between American Security and Akamine & Sons, Ltd. The mortgage is the integrated document containing their entire agreement and parol evidence could not be introduced merely because Hawaii National was not a party to the mortgage.

Hawaii National contends that it was entitled to have George Akamine's testimony introduced under either of two well-recognized exceptions to the parol evidence rule: to prove the real consideration for the mortgage, and to prove fraud. Hawaii National's attempt to connect the issue of consideration with the debts intended to be covered is ingenious but ineffective. It does not contend that the mortgage failed for lack of consideration or that the stated consideration was not given by American Security. Even if the question of consideration were in issue, the parol evidence, in the form of George Akamine's testimony, did not relate to this issue and therefore was properly excluded.

Finally, even were we to construe Hawaii National's allegation in its amended petition to intervene as an allegation of fraud, the offer of proof failed to support the allegation.[3] On cross-examination, George Akamine conceded that he had no role in negotiating the mortgage. Such testimony was completely worthless on the issue of fraud.

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[3] The language Hawaii National relies on as alleging fraud is that American Security "contrary to any prior understanding and without justification" attempted to include additional debts under the mortgage.

3. Coverage of the Mortgage

Mortgages to secure future advances have been authorized by the legislature since 1939, S.L.H. 1939, Act 255. R.L.H. 1955, § 196-1 provides in part that a mortgage

> may secure . . . a debt incurred for advances which may be made by the mortgagee subsequent to the execution of the mortgage even though the mortgagee is under no contractual duty to make such advances.

The only mention of this provision in the legislative reports states that it

> will save the borrower the costs of the preparation of additional charge mortgages and the recording costs of such additional charge mortgages. Stand. Comm. Rep. No. 396, House J. 1939 at 1337.

The statute may be read as authorizing the broadest form of mortgage for future advances, but we decline so to construe it.

Mortgages to secure future advances may take many forms, *see* Blackburn, *Mortgages to Secure Future Advances*, 21 Mo. L.Rev. 209, 211 (1956). Significant benefits to the mortgagor, the mortgagee, and the economy may result from intelligent use of such mortgages.[4] Such mortgages, however, often "fall far short of reaching a financial utopia". 21 Mo. L.Rev. at 211. In spite of the severe restriction the broader manifestations of the mortgage for future advances place on the mortgagor, we do not know of any court which has denied enforcement of such mortgages as contrary to public policy.[5] Many courts, however,

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[4] Financing costs may be lower, Osborne, *Mortgages* 276 (1951). They provide quicker, more flexible financing, Blackburn, *Mortgages to Secure Future Advances*, 21 Mo. L.Rev. 209-11 (1956).

[5] 3 Glenn, *Mortgages* 1601 (1943); 1 Jones, *Mortgages* 503 (7th ed. 1904); Osborne, *supra* note 3 at 284.

have placed limits on the mortgages.[6] Several states have legislatively restricted their use.[7]

We are prevented from holding a mortgage to secure future advances contrary to public policy by its statutory authorization and the undeniable benefits which it may engender. As a court of equity, however, we will construe such mortgages very strictly against the mortgagee. *See First* v. *Byrne*, 238 Iowa 712, 28 N.W.2d 509 (1947). Completely unrestricted enforcement of such mortgages would tend to reduce the borrower to the status of economic serf. One commentator has viewed this as a virtue since it would enable the lending institution to "act as a check on the mortgagor to discourage excessive credit buying."[8] We cannot agree that a lending institution, any more than a state or the federal government, makes a desirable "Big Brother".

Under the ejusdem generis rule, the statute does not require us to enforce a dragnet, or anaconda, clause in a mortgage as to debts or obligations not of the same kind as the specific principal debt or obligation for which the mortgage is given. Unless the prior or subsequent advance relates to the same transaction or series of transactions, the mortgage must specifically refer to it for the advance to be secured. This court will not assist a lending

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[6] Connecticut has taken the strongest stand against the broad mortgage to secure future advances. *See* Pettibone v. Griswold, 4 Conn. 158 (1822). *See also*, Berger v. Fuller, 21 S.W.2d 419 (Ark. 1929) (court refused to conclude that the mortgagor intended to secure the mortgagor's debts *which the mortgagee might purchase from others*); Beavers v. Le Sueur, 188 Ga. 393, 3 S.E. 2d 667 (1939) (court refused to construe the broad clause to include damages the mortgagee sustained from *mortgagor's breach of contract unrelated to the mortgage debt*); Belgon v. Farmers' & Merchants' Bank & Trust Co., 186 N.C. 613, 120 S.E.220 (1923) (court refused to include any debt other than the one specifically secured on the grounds that no others were "*within the contemplation of the parties*").

[7] Ga. Code Ann. § 67-1316; Md. Code Ann. Art. 66, § 2; N.H.Rev. Stat. Ann. § 476:3.

[8] Blackburn, *supra* note 4 at 211.

institution in an attempt to captivate a borrower by inclusion in a mortgage of a broad all inclusive dragnet clause. Contracts requiring one party to deal exclusively with one supplier have been viewed with great suspicion under the antitrust laws. *Standard Oil Co.* v. *United States* (Standard Stations), 337 U.S. 293 (1947); R.L.H. 1955, as amended § 205A-3. To attempt to foreclose, for example, on the mortgagor's home for debts incurred in operating a business and which debts are not specifically covered by the mortgage would be unconscionable and contrary to public policy.

Even were we to decide this case on the basis of the intention of the parties, the result would be the same. American Security recorded an additional charge mortgage to secure its subsequent loan of $105,000 to Akamine & Sons, Ltd. If any loan could be construed as within the terms of the clause of the original mortgage, it was that loan. As recognized by the legislature, the benefit of a mortgage to secure future advances is the elimination of the cost of additional charge mortgages. Nowhere in the record did American Security attempt to explain the reason for the additional charge mortgage. Furthermore, none of the other loan documents, allegedly secured by the mortgage, refer in any way to the mortgage as security. In every case, American Security received full security for each debt.

American Security is entitled to receive proceeds from the foreclosure sale sufficient to cover the unpaid balances of the original loan of $250,000 and the subsequent loan of $105,000 with interest, costs, attorney's fees and other expenses properly chargeable to it. Hawaii National is entitled to the proceeds remaining to the extent that they may be required to cover its loan secured by its mortgage.

Reversed and remanded for further proceedings.

Chuck Mau (Mau & Ho of counsel)
for petitioner-intervenor-appellant.

Walter G. Chuck (Chung, Vitousek,
Chuck & Fujiyama of counsel)
for respondent-appellee.

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APPENDIX D

CIVIL NO. 15405

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

AKAMINE & SONS, LTD., a Hawaii corporation, *Petitioner*,
HAWAII NATIONAL BANK, HONOLULU, *Petitioner-Intervenor*
vs.
AMERICAN SECURITY BANK, *Respondent*.

Decision

This suit involves a determination of priorities. Properties covered by a mortgage from Akamine & Sons, Limited, to American Security Bank (Petitioner's Exhibit 1) have been sold by the bank for $449,000.00 pursuant to a power of sale contained in the mortgage. What is needed is a determination as to whom this $449,000.00 belongs.

I.

The defective acknowledgment.

One of the claimants is Hawaii National Bank, Honolulu. This bank holds mortgages from Akamine & Sons, Limited, on the same property (Intervenor's Exhibits 2, 3, and 5) that were executed and recorded after the mortgage to American Security Bank was executed and recorded. Nevertheless Hawaii National Bank, Honolulu, claims its mortgages have priority over the American Security Bank mortgage because of the manner in which the latter was acknowledged. The facts are as follows.

On September 26, 1960, Akamine & Sons, Limited, executed its mortgage (Petitioner's Exhibit 1) to American Security Bank. The mortgage is signed as follows:

"AKAMINE & SONS, LIMITED,
By *Sotaro Akamine*
Its President

George Akamine
Its Vice President"

The Seal of Akamine & Sons, Limited is affixed to said signature.

The acknowledgment, however, reads as follows:

"STATE OF HAWAII
CITY AND COUNTY OF HONOLULU } :ss

On this 26th day of September, A.D., 1960, before me appeared Sotaro Akamine and George Akamine, to me personally known, who being by me duly sworn, did say that they are President and Vice President, respectively, of ARAKAWA & SONS, LIMITED, a Hawaiian corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corportation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said Sotaro Akamine and George Akamine acknowledged said instrument to be the free act and deed of said corporation.

ELIOT H. K. WONG (Seal)
Notary Public, First Judicial
Circuit, State of Hawaii.
My commission expires: 10/9/63."

Thus it can be seen that the acknowledgment is in proper form, except for the fact that the corporation referred to is Arakawa & Sons, Limited, instead of Akamine & Sons, Limited.

Hawaii National Bank, Honolulu, argues that due to the foregoing defect, the mortgage never should have been recorded, and that its recording does not constitute constructive notice to Hawaii National Bank, Honolulu. Authority is cited for its position.

American Security Bank argues on the other hand that the defect is of such a nature that the recording does constitute constructive notice. Authority is cited for its position.

It appears to the Court that even if one considers only the instrument itself, an obvious clerical error has occurred. The mortgage is from Akamine & Sons, Limited, Mortgagor, to American Security Bank, Mortgagee; it is

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signed by Akamine & Sons, Limited by Sotaro Akamine, President, and George Akamine, Vice-President; and the seal of Akamine & Sons, Limited is clearly affixed to the instrument. Further, Sotaro Akamine and George Akamine acknowledged as President and Vice-President, respectively. Finally the acknowledgment states "that the seal affixed to the foregoing instrument is the corporate seal of said corporation." If this be taken literally, the seal affixed to the instrument should be that of Arakawa & Sons, Limited. In fact, however, the seal affixed to the instrument is that of Akamine & Sons, Limited, further showing that a clerical error has occurred.

The foregoing conclusion is buttressed by the parol evidence. George Akamine testified that Sotaro was President and he was Vice-President of Akamine & Sons, Limited. There is nothing in the record to connect either of them with Arakawa & Sons, Limited, assuming there is such a corporation. Further George testified that Mr. Wong, the notary, knew him to be an officer of Akamine & Sons, Limited. And Mr. Wong, the notary, testified that his notary book shows the mortgage to have been signed by Akamine & Sons, Limited.

There is authority that a variance between the name in the instrument and the name in the acknowledgment is immaterial where it arises from obvious clerical error. See 1 Am. Jur. (2), *Acknowledgments,* Sec. 67, and some of the cases cited in 29 A.L.R. at pages 1004 and 1005 and 25 A.L.R.(2) at page 1162.

The foregoing makes sense to me. To hold that there is no constructive notice because of an obvious clerical error in the acknowledgment where the mortgage has in fact been accepted for recordation and recorded violates common sense.

I find nothing in *Lalakea* v. *Hilo Sugar Co.*, 15 Haw. 570 that compels a different conclusion. That case dealt with a

different type of defect and also with rules peculiar to chattel mortgages.

The following dictum in *Lanahan* v. *Akana*, 6 Haw. 538, at pages 540-541, on the other hand, may be directly in point.

> "There is a wide distinction between the effect of the record of mortgages of chattel property and one of real estate. The record of the former is essential to its validity; the record of the latter operates as notice to subsequent purchasers or mortgagees, and has no effect upon the validity of the instrument, for if actual notice of a prior mortgage can be proved, it is as effectual as recording would be, and *in such cases the spreading upon the record of a mortgage of real estate, though by reason of its informality not entitled to record, has been held to be notice to creditors and purchasers.*" (underscoring added)

The holding is that the mortgage to American Security Bank (Petitioner's Exhibit 1) has priority over the mortgages to Hawaii National Bank, Honolulu (Intervenor's Exhibits 2, 3, and 5).

II.

The coverage of the dragnet clause.

The said mortgage by Akamine & Sons, Limited to American Security Bank (Petitioner's Exhibit 1) secured not only a loan to Akamine & Sons, Limited of $250,000.00 made at the same time, but it also contained what is known as a dragnet clause. The clause read as follows:

> "PROVIDED, HOWEVER, that if the Mortgagor shall . . . discharge any and all obligations that now are or hereafter may be or become owing directly or contingently by the Mortgagor to the Mortgagee on any and every account whether or not the same are mature, of which obligations the books of the Mortgagee shall be prima facie evidence and which obligations it is agreed by these presents are and shall be

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secured as additional charges against all the property hereby mortgaged, ... THEN THESE PRESENTS SHALL BE VOID."

It is necessary to decide whether certain other obligations of Akamine & Sons, Limited to American Security Bank are embraced by the dragnet clause, so they too are to be paid from the proceeds of sale ahead of the mortgages to Hawaii National Bank, Honolulu.

Petitioner, Akamine & Sons, Limited, has cited on page 6 of its first memo, two Iowa cases showing an evident dislike of dragnet clauses. However, such clauses seem to be generally accepted. See 36 Am. Jur., *Mortgages,* Sec. 63.5, being next text found on page 112 of the 1964 Cumulative Supplement.

During the trial, as counsel will remember, I was faced with the problem of deciding whether to admit parol evidence regarding the construction of the dragnet clause. At that time I declined to allow such evidence by either side. Since then I have examined Chapter XII, Jones on Evidence, Fifth Edition, entitled Extrinsic Evidence Affecting Writings (Parol Evidence Rule) and cannot find anything that clearly indicates my rulings were erroneous. Under the circumstances they will be adhered to.

Re the obligations covered by the dragnet clause, they will be discussed seriatim.

1. On February 14, 1961, Akamine & Sons, Limited borrowed $105,000.00 from American Security Bank, giving a note therefor (Respondent's Exhibit C). It appears to the Court that the balance due on this note is clearly covered by the dragnet clause, and of course American Security Bank also has priority regarding this balance by virtue of the additional charge mortgage (Respondent's Exhibit E).

2. On August 22, 1962, Val Super Market, Limited and Akamine & Sons, Limited borrowed $40,000.00 from American Security Bank for the operating uses of the Val Super

Markets (testimony of Mr. Lau). The note was signed by the two companies as co-makers, and security given as follows.

Akamine & Sons, Limited gave to the bank a first mortgage on a vacant lot at Waimalu, and it was further agreed between the parties that a minimum of $40,000.00 from sales of the inventory at the Ewa store would be used to pay off this loan. As matters developed, however, the proceeds from the sale of the vacant lot were applied towards other indebtedness, this as near as I can tell being authorized by paragraph 4 of Respondent's Exhibit H. The inventory from the Ewa store was transferred to the other stores at the time the Ewa store was sold, and thereafter $11,000.00 was paid to American Security Bank from the combined receipts of all stores, Mr. Ichiro Akamine testifying that he did not know to what indebtedness the money was applied, but admitting at the end of his testimony that there was an agreement that the bank could apply the money to any indebtedness of Val Super Market, Ltd. or Akamine & Sons, Limited. As the result of what happened to the security, the balance due on this loan exceeds the original amount of the loan.

The problem is whether the dragnet clause covers this obligation of Akamine & Sons, Limited. The cases are divided as to whether the existence of other security takes a debt out of the dragnet clause (See 172 A.L.R. page 1106). I don't see why it should where, as here, the language of the dragnet clause is broad enough to cover the obligation.

3. On August 2, 1960, prior to the execution of Petitioner's Exhibit 1, Val Super Market, Ltd. and American Security Bank entered into a combination agreement and chattel mortgage (Respondent's Exhibit B). Under this document American Security Bank agreed to make loans to Val Super Market, Ltd. from time to time with the aggregate principal outstanding at any one time not to

exceed $190,000.00. Each loan was to be evidenced by a promissory note. Additionally, part of the document consists of a chattel mortgage to secure this indebtedness. Finally, near the end of the document occurs the following language:

> "AND, AKAMINE & SONS, LTD., in consideration of the promise on the part of the Mortgagee as aforesaid and in order to induce the Mortgagee to make such loans, does hereby covenant and agree to and with the Mortgagee that it will guarantee and indorse any and all promissory note or notes evidencing any advances made to the Mortgagor as provided herein to secure unto said Mortgagee the repayment of any and all sums that may now be owed or hereafter become due and owing to the Mortgagee from the Mortgagor, *and further agrees that it will guarantee to repay all of said sums according to the terms of the said notes evidencing such loans, whether or not it has indorsed any of said notes which have been executed by the Mortgagor pursuant to the terms and provisions of this Agreement.* (underscoring added.)

The document was also signed by Akamine & Sons, Limited.

Pursuant to the foregoing document, on May 1, 1962, Val Super Market, Ltd. borrowed $190,000.00 from American Security Bank, the loan being evidenced by a promissory note (Petitioner's Exhibit 2). The note was never indorsed by Akamine & Sons, Limited.

Mr. Lau testified and the Court finds that this note has been delinquent since July 1963.

The question first to be considered is whether Akamine & Sons, Limited has contracted as a guarantor to pay the principal and interest due under this note.

It is argued that the underscored language above uses the words "will guarantee" and hence constitutes only a promise to make a guaranty in the future. Although the language used is awkward, it does seem plain to me that

the intent is to bind Akamine & Sons, Limited as a guarantor.

Having reached the conclusion that Akamine & Sons, Limited is a guarantor, is it presently liable to American Security Bank for the delinquent principal and interest, or as argued by Petitioner, must American Security Bank proceed against Val Super Market, Ltd. before being able to enforce the guaranty.

It is my belief that the law makes Akamine & Sons, Limited presently liable to American Security Bank for the delinquent principal and interest.

As stated in *International Trust Co.* v. *Suzui*, 31 Haw. 34:

> ". . . The law on this subject is thus stated in 23 C. J. 972, § 125: '*As a general rule a guaranty of the payment of an obligation of another is an absolute undertaking imposing liability upon the guarantor immediately upon the default of the principal debtor and regardless of whether any legal proceedings or steps are taken to enforce the liability of the principal debtor, or whether notice of the default is given to the guarantor, and regardless of the solvency or insolvency of the principal debtor.* In accordance with this rule if the guaranty fixes the time of payment, and payment is not made within the time prescribed, there is a breach of the guaranty and no steps need be taken against the principal to fix liability on the guarantor.' In a note to this text the annotator makes the following correct summary of the decision of the supreme court of California in *Pierce* v. *Merrill*, 128 Cal. 464, 61 Pac. 64, 79 Am. S. R. 56: '*An instrument by which the person executing it guarantees the payment of a loan at the time and according to the terms expressed in a specified note and mortgage is an absolute guaranty, and liability is imposed upon the guarantor upon default in the payment of the loan, although no attempt has been made by the creditor to foreclose the mortgage.' (p. 973.)* (underscoring added)

See also 24 Am. Jur., *Guaranty*, Secs. 16, 110, 112, and 113, as being in accord with the foregoing.

It also appears to the Court that the dragnet clause is broad enough to cover this liability of Akamine & Sons, Limited to American Security Bank.

Petitioner argues that any action on the guaranty would be an action for damages and the old action of debt would not lie. I see no need to decide whether there is a debtor-creditor relationship re the guaranty (for authority saying that there is, see 24 Am. Jur., *Guaranty*, Sec. 71), because the dragnet clause uses the language "obligations ... owing directly ... by the Mortgagor to the Mortgagee on any and every account . . ." and this seems broad enough to cover the liability on the guaranty, even if it be considered a liability for damages.

Two other points deserve consideration.

See 196-1, R.L.H. 1955 dealing with mortgages securing future advances has been referred to, the argument being that a future liability under a guaranty is not a future advance within the meaning of this statute. With this argument I agree. But it does not follow from that that the dragnet clause is invalid insofar as it secures a future liability under a guaranty. Such a clause is lawful at common law (See 36 Am. Jur., *Mortgages*, Sec. 64) and I think Sec. 196-1 should be construed as simply clarifying the Hawaiian law with respect to mortgages and that type of future obligation known as a future advance. Pointing to this conclusion is the report of the House Committee on Judiciary with respect to what is now Sec. 196-1 found in the 1939 House Journal at page 1137.

Finally it has been argued that at least insofar as the mortgage covering registered land is concerned, there is nothing in the memoranda of encumbrances on the Transfer Certificate of Title (Intervenor's Exhibit 1) that discloses that the mortgage secures a future liability under

a guaranty, and hence it cannot lawfully do so. The Transfer Certificate of Title does, however, indicate the existence of the American Security Bank mortgage and its document number. This to me is sufficient to charge a subsequent encumbrancer with knowledge of what is contained in the mortgage.

III.

The amounts recoverable.

The evidence shows the amounts due American Security Bank and secured by Petitioner's Exhibit 1 to be as follows:

1. On account of the loan for $250,000.00, the sum of $251,134.76 (Respondent's Exhibit D). Additionally, interest and late charges have been accruing since September 30, 1964 at the rate of $50.63 per day (testimony of Laurence Lau). They will be allowed to November 27, 1964, the date American Security Bank began to have the use of the money pursuant to the stipulation filed on that date.

2. On account of the loan for $105,000.00, the sum of $54,237.80 (Respondent's Exhibit D). Additionally, interest and late charges have been accruing since September 30, 1964 at the rate of $14.31 per day (testimony of Mr. Lau). They will likewise be allowed to November 27, 1964.

3. On account of the loan for $40,000.00, the sum of $40,841.67, this sum comprising the principal and interest only as shown on Respondent's Exhibit D. Late charges were excluded by stipulation made in open Court. Additionally, there is interest due on the principal sum of $40,000.00 at the rate of 7½% per annum from October 1, 1964 to November 27, 1964.

4. On account of the guaranty, the sum of $77,976.95, representing the principal and interest shown on Respondent's Exhibit D. Late charges were excluded by stipulation in open Court. There is also due interest on the principal

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sum of $75,955.13 at the rate of 7½% per annum from October 1, 1964 to November 27, 1964.

5. Additionally the mortgage provides (Petitioner's Exhibit 1, page 7)

> "and out of the proceeds of any foreclosure sale the Mortgagee may deduct all costs and expenses of sale, ... foreclosure and suit, or any of them, including reasonable compensation for the services of its employees or officers in connection therewith. . . ."

Under this provision, American Security Bank is entitled to recover all of its out-of-pocket expenses in connection with the foreclosure.

Only items 1, 12, 16, 17, 18 and 19 as shown on Respondent's Exhibit Y are in dispute. The undisputed items total $1312.05.

Item 1 is not connected with the foreclosure, nor has it been shown with sufficient clarity that it is recoverable under any other provision of the mortgage.

Item 12 relating to payment of real property taxes of $1572.37 is recoverable.

Item 16 relating to the premium of $1200.00 for title insurance is recoverable.

Item 17 relating to $495.00 in revenue stamps is recoverable.

The first 3 items shown on Y-18, totalling $15.00 are recoverable.

All the items shown on page 2 of Y-19 totalling $91.41 are recoverable.

The legal fees shown on page 1 of Y-19 are recoverable but as attorney's fees recoverable under the mortgage. Hence the allowance here should be deferred pending the placing into the record of Mr. Chuck's bill for legal serv-

ices in connection with the foreclosure, as more fully set forth below.

Thus on the basis of Exhibits Y, including Y-1 through Y-21, and the testimony and stipulations in connection therewith, the sum of $4685.83 in expenses is recoverable.

With respect to Exhibit Z, I find that only the expenses of $23.00 and $25.00 for xerox copies are recoverable.

Thus the expenses recoverable under the foregoing provision of the mortgage total $4733.83.

As indicated above the mortgage also provides that American Security Bank may recover reasonable compensation for the services of its officers or employees in connection with a foreclosure.

Mr. Laurence Lau testified he spent 10-15 hours on the foreclosure, not including time spent with possible purchasers. This latter time amounted to 31 hours and 55 minutes, according to the testimony. Mr. Lau's salary is $36,000.00 a year. He generally works 55 hours a week which comes out to 2860 hours per year. Hence the bank pays him approximately $12.50 per hour.

Under the circumstances, I will allow to American Security Bank under the foregoing provision $525.00 (42 hours x $12.50 per hour.)

The rest of the 500 hours testified to by Mr. Lau does not appear recoverable under the terms of the mortgage.

Nor does the time of Mr. Ellery Chun appear recoverable under the mortgage.

Nor has the claim for $1200.00 for bookkeeping, etc. shown on Respondent's Exhibit D been established to be within the terms of the mortgage.

6. The mortgage (Petitioner's Exhibit 1) contains several provisions on attorney's fees. They are as follows:

1) "The Mortgagee shall, further, have the right to take immediate possession of the property herein

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mortgaged and to rent the same, and shall be liable to account to the Mortgagor only for the net profits thereof, and shall be allowed to deduct all costs of operation, expenses, attorney's fees and all other expenses connected with the management, operation and maintenance of the property herein mortgaged;"

The foregoing provision seems to apply only where the mortgagee has taken possession of the property, which was never the case here.

2) "and that in default of any such payment or upon failure to observe or perform any covenant or condition of this mortgage, or if any suit, proceeding or other contingency shall arise or be threatened with respect to any of the mortgaged property, the Mortgagee may make any advances that to it may seem proper or necessary to protect its security; and that it may recover any such advances made and all expenses, including attorney's fee, paid or incurred by it, even though any such charge or claim be invalid, upon demand, together with interest thereon to the date of payment at the rate of ten per cent (10%) per annum, and the same shall be secured hereby."

The foregoing provision is not as clear as it might be, but its purpose appears to be to allow recovery of attorney's fees paid or incurred in connection with advances made by the Mortgagee. That was never the situation here.

3) "That the Mortgagor will pay and discharge all costs and attorney's fees and expenses that shall arise from enforcing the covenants and conditions of this mortgage." (page 5)

4) "and out of the proceeds of any foreclosure sale the Mortgagee may deduct all costs and expenses of sale, receivership, foreclosure and suit, or any of them, including . . . . an attorney's fee equal to twenty per cent (20%) of the principal and interest due, ..."

The foregoing two provisions appear to overlap to some extent.

Mr. Chuck testified as to certain services he had rendered to American Security Bank between March 1962

and September 28, 1964, the day the decision to foreclose Petitioner's Exhibit 1 was made. I consider this testimony to be accurate and the bill that he submitted to American Security Bank for $5000.00 to be reasonable. However, with the possible exception of "the problem of selling the Wilder Avenue property," I fail to see where Akamine & Sons, Limited is liable for any of these services under the terms of Petitioner's Exhibit 1, quoted above. These services related to such things as attempting to improve the operation of the various Val Super Markets, stemming off creditors of Val Super Market, Limited, and Akamine & Sons, Limited, effecting a control over the daily cash receipts of the Val Super Markets, etc. The problem of selling the Wilder Avenue property was not related to me in enough detail to determine whether American Security Bank can recover for these services under Petitioner's Exhibit 1.

Mr. Chuck also testified to 140 hours and 15 minutes being spent in connection with the foreclosure. This all seems connected with the foreclosure with the exception of 1 hour spent in the United States District Court in connection with the involuntary bankruptcy petition filed against Val Super Market, Limited, and 1½ hours spent defending against a petition to cancel a sublease to Atlas Land Company. Additionally, the minutes show Mr. Chuck spending 7 hours 4 minutes in Court after the day he testified. It was also represented in open Court at the close of the final hearing that Mr. Chuck had spent another 2-3 hours of time in connection with the foreclosure. Thus it is obvious that American Security Bank is going to have to pay Mr. Chuck for approximately 147 hours of services that he personally rendered in connection with the foreclosure.

Additionally the bank will also be paying for 50 hours of time spent by Mr. Dewa in research in connection with the foreclosure. Mr. Chuck testified that he hired Mr. Dewa, expects to pay him $10.00 per hour (although he has not agreed to do so) and that this will be added to

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the bill to American Security Bank. It was also represented in open Court at the close of the last hearing that another 2-3 hours should be added to Mr. Dewa's time.

Mr. Chuck also testified that he hired Mr. Fujiyama at a tentatively agreed upon rate of $35.00 per hour and that Mr. Fujiyama had spent so far 47 hours, not including court time. The minutes show the entire court time for Mr. Fujiyama to be 25 hours, 8 minutes. It was also represented in open Court at the close of the last hearing that Mr. Fujiyama had spent another 17 hours on the case. Mr. Chuck indicated that the American Security Bank will be billed for this time, if the mortgagor does not pay for it.

Mr. Chuck finally testified that Mr. Shigezawa has worked 59½ hours, that he charges $35.00 an hour for Mr. Shigezawa's time, and that American Security Bank will be billed for this time if he doesn't receive it from the mortgagor. It was also represented in open Court at the close of the final hearing that another 14 hours should be added to Mr. Shigezawa's time.

Mr. Chuck's request is for an amount that would equal what is allowed in a default proceeding (Rule 11 of the Rules of the First Circuit Court) plus an allowance for his time, and the time of Messrs. Fujiyama, Shigezawa, and Dewa.

It appears to the Court that substantial attorney's fees are going to have to be paid from the proceeds of sale. However it seems to me that before anything is allowed, I should have in the record Mr. Chuck's bill to the American Security Bank for the services in connection with the foreclosure. On the present state of the record, I don't know what Mr. Chuck charges per hour, and further he has no firm agreement with Mr. Dewa and only a tentative agreement with Mr. Fujiyama. When a bill to American Security Bank is made a part of the record, the bill can be compared with the facts as found above to see what

the allowance should be. The case will be reopened to this extent.

IV.

The ultra vires argument.

American Security Bank has argued that the mortgages of Akamine & Sons, Limited to Hawaii National Bank, Honolulu (Intervenor's Exhibits 2, 3, and 5) are ultra vires, because made to secure the obligations of other corporations and individuals to Hawaii National Bank, Honolulu. I have reviewed the charter of Akamine & Sons, Limited (Respondent's Exhibit O) and find these mortgages to be authorized to reading together Article III, paragraph 1, sub-paragraphs (a) and (b), and Article III, paragraph 2, sub-paragraph (j).

Dated at Honolulu, Hawaii, this 14 day of December, 1965.

Judge of the above-entitled Court

APPENDIX E

Due Process Clause of Amendment XIV to the Constitution of the United States:

> "... nor shall any State deprive any person of life liberty, or property, without due process of law...."

Section 196-1 of Revised Laws of Hawaii (1955) provides in pertinent part that a mortgage:

> "... may secure ... a debt incurred for advances which may be made by the mortgagee subsequent to the execution of the mortgage even though the mortgagee is under no contractual duty to make such advances."